No. 2365

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLAF LIE, master of the Norwegian steamship "Selja", on behalf of himself and the owners, officers and crew of said steamship,

Appellant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, claimant of the American steamship "Beaver",

Appellee.

BRIEF FOR APPELLEE, SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, CLAIMANT OF THE AMERICAN STEAMSHIP "BEAVER".

WILLIAM DENMAN,

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MCCUTCHEN, OLNEY & WILLARD,

DENMAN AND ARNOLD,

Of Counsel.

Filed this.....day of March, 1914.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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In his opening brief, counsel has made an elaborate statement of facts, with which we take issue vigorously in practically every essential feature.

In a later portion of this brief, we clearly show, after a careful consideration of the voluminous evidence, several vital faults on the part of the "Selja", and that the facts which she claims as establishing her case

are not only not supported by the record but are contradicted by the overwhelming preponderance of the testimony. Not even the red ink foreword on the cover is a fair summary of the evidence as we understand it.

We show, from certain undisputed statements in the testimony of the "Selja", that the movements described in her elaborate diagrammatic explanation of the occurrences off Point Reyes could not have taken place in the manner indicated. With regard to the movements of the "Beaver", we show that her fault, while a violation of the rule, had a good reason behind it, i. e., the safety of her passengers, and that it cannot be described as recklessness or gross negligence, even though that question were pertinent, which it is not. Not only do we dispel all the alleged inconsistencies as to the testimony as to her speed, but we show that the different rates testified to by the different officers as existing at different times are controlled by different circumstances, making the whole testimony harmonious, and show it to be the only testimony that could be given for the varying circumstances. We show that the elaborate scientific calculations made by the "Selja's" experts in ship construction as to the speed of vessels in the smooth water of the launching pool are clearly contradicted by officers of United States ships and experts, both nautical and otherwise, on the effect of wave action on vessels. We show, by the undisputed official records, that the testimony of the Scandinavian fishermen procured as witnesses by Captain Lie, as to the conditions on the day of the col-

lision, is not only untrue but seems a continuation of the methods whereby Lie, out of whole cloth, constructs a theory that the collision occurred off Point Reyes when in fact it was several miles away.

The opinion of the lower court disposes of the question of the liability of the "Selja" on the statement of facts in the libel, and the admissions of the officers made in the course of their testimony. For purposes of the point we adopt Captain Lie's statements, and, as the sustaining of Judge Bean's decision would obviate the necessity for the court's examination into the 1480 odd pages of the four volumes of the record, we will treat the question of the violation of rule 16 in full before taking up the other issues. In so doing, we do not desire to concede Lie's account of the movements of his vessel from three to three fifteen o'clock to be true, our contention being that his own statement of the case establishes that his vessel, in the manoeuvres in the fog prior to the collision, when the vessels were exchanging fog signals, did violate rule 16, requiring him to stop his engines on hearing the "Beaver's" whistle. Whether or not the violation was the "*efficient cause*" of the collision, it was a *sine qua non* thereof, that is to say the effects of the violation of the rule lasted until the vessels were *in extremis* and the collision would not have occurred had the rule been obeyed.

The vital point here is that *up to the very moment the vessels were in extremis* the "Selja" was driven continuously on a course approaching the course of a

vessel from San Francisco, whose bows she knew she must cross, as the result of working her engines for ten minutes in violation of a rule requiring her to stop them and not thereafter navigate at above steerage way. She reached that point only by virtue of a power exercised in violation of the statute. If the statute had not been violated, she would not have *just arrived* at the danger point when the "Beaver" came in sight. The violation of the statute, whether or not it was the "efficient" cause of the loss, was the "*sine qua non*" thereof. It can be truly said that "but for" the violation of the statute, the effects of which continued till the vessels were *in extremis,* the collision would not have occurred.

I.

Judge Bean's decision is squarely sustained by the leading American and English cases, "The Admiral Schley", "The Georgic" and "The Britannia". The "Selja" violated rule XVI ten times in not stopping her engines on hearing the first ten whistles of the "Beaver". If she had stopped her engines she would not have reached within thousands of feet of the crossing point of the courses of the two vessels when the "Beaver" passed and the collision could not have occurred. Instead she was broadside on, moving across the bows of the "Beaver" at the moment of impact.

The second paragraph of rule XVI provides:

> "A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over." (26 Stat. 320, Art. 16.)

As we will more fully develop, if a vessel violate this rule requiring stopping on hearing the opposing whistle, or any one of the specific injunctions of the International Rules,* and a collision occur, she will be held liable unless she can show that the collision would have occurred *even if she had obeyed the rule.* The burden is on her to show not only that her act did not *cause* the accident, but that it could not have *contrib-*

* Unless excused by the Emergency Rule 27, which is not claimed here.

uted to the accident. It is not enough that she show that her violation of the statutory rule was not the *causa causans* of the collision, she must show that it is not a *sine qua non.* Indeed the rule goes even further. She has the burden of showing this not only by the preponderance of the evidence, but she must show that the violation *"could not by any possibility"* have contributed to the collision.

We shall show that the "Selja" violated rule 16 and that she not only cannot maintain the burden of proof placed by the law upon her to show beyond doubt that the violation did not contribute to the collision, but shall ourselves assume the burden and show affirmatively that, if she had stopped her engines in compliance with the rule, the collision would not have occurred.

The testimony of the "Selja's" officers establishes the following facts, essential to their case, which for the purposes of this section* we take as true:

(a) At 3 p. m. while in a dense fog, the "Selja" heard the "Beaver's" whistle at first apparently dead ahead and then broadening on her port bow and continued to hear her five second automatic blast, always thereafter at the same bearing on the port bow, at 55 second intervals for fifteen minutes and until the collision;

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* In our succeeding sections we set forth what we believe the evidence shows really to have occurred. And this is our answer to counsels' challenge as to which set of facts we rely on. Admitting what they assert, the "Selja" was in fault and liable. If the court finds the real facts she is equally liable.

(b) At no time till 3:15 was the "Beaver's" position ascertained by the "Selja's" officers. They did not know either the distance to the "Beaver", or the course on which she was proceeding. For ten minutes, that is until 3:10, they did not know the whistle came from a vessel but thought it might be a fog whistle at Point Bonita, over 24 miles away, and seven and a half miles easterly of their course.

(c) At 3 p. m. the "Selja" was on a course of S. 65 east, steering straight for the lightship off San Francisco. The "Beaver", as appears from the testimony of her officers, was on her regular northerly trip to Portland, steering N. 86 west, straight from Duxbury Reef to her next departure off Point Reyes. The vessels, according to the admissions of each, continued on these two courses till they were *in extremis*. From the beginning, the "Selja's" officers were charged with knowledge that she was in all likelihood on a course crossing the course of a vessel coming out from San Francisco on the regular trade route up the coast around Point Reyes.

(d) The "Selja" at 3 p. m. was 6080 feet from the point where the two courses crossed (libelant's Ex. 1).

(e) The "Selja" was proceeding at 40 revolutions, or 6 knots an hour at 3 p. m. and, according to libelant's Exhibit No. 1, continued at 6 knots till 3:05, covering 3040 feet towards the crossing point of the two courses. That she dropped her revolutions at 3:05 to 20 revolutions and continued at diminishing speed till she had reduced to 3 knots at 3:10 p. m., covering in

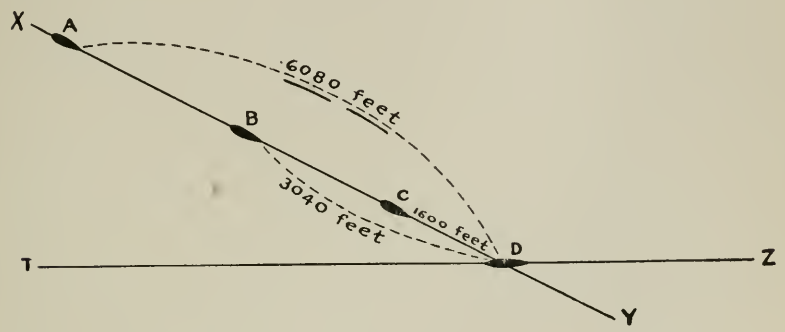
the second five minutes 2075 feet. That she then continued till 3:15 p. m., at which time she had just come to a standstill (Lie, page 173), having covered, in the last five minutes, 1015 feet. In all, according to libelant's Exhibit 1, she traveled after 3 p. m., 6080 feet towards the point of crossing of the two courses. Just as she came to a standstill, the "Beaver" emerged from the fog 900 feet distant. Both vessels were then *in extremis,* and the "Selja" began backing at right angles across the "Beaver's" bow (page 424) and moving not to exceed 100 feet astern.

(f) If the "Selja" had stopped her engines at 3 p. m., on hearing the "Beaver's" whistle, as required by the rule, and kept them stopped till 3:15 p. m., when she ascertained the position of the "Beaver", she would have covered less than 2075 feet between 3:00 and 3:05, 1015 feet between 3:05 and 3:10, and have been dead in the water from 3:10 on. While she was thus lying dead, the "Beaver" would have safely crossed her course at *some time between 3:15 and 3:16,* not less than 3040 feet distant from her.

(g) The "Selja's" steerage way for the conditions of that day was under two knots (page 248). If, instead of coming to a standstill in the water, the "Selja" had stopped her engines at 3:00 p. m. and kept them stopped till her speed had dropped to her steerage way, i. e., under two knots, 200 feet per minute, she would undoubtedly have reached this rate at 3:08, having covered not more than 2775 feet; if her engines had been started and had she continued at her steerage way

of less than 200 feet per minute, she would not have reached the point where the courses crossed till 3:24, or over eight minutes after the "Beaver" had passed by in safety some 1600 feet ahead of her.

The situations then are illustrated by the following diagram:



XY "Selja's" course S. 65 east.

TZ "Beaver's" course N. 86 west.

A "Selja" at 3 p. m. when she hears "Beaver's" fog signal on her port bow and hence indicating a vessel coming from San Francisco, whose course she was crossing in steaming for the lightship.

B Where "Selja" would have been at 3:16 when "Beaver" crossed her course at D if she had stopped her engines till she had ascertained "Beaver's" distance and course—i. e., 3040 feet from "Beaver" at 3:16.

C Where "Selja" would have been at 3:16 if she had dropped to steerage way—1600 feet from the "Beaver".

D "Beaver" at 3:16 crossing "Selja's" course.

The exact question as to rule 16 presented by this case has been decided by both the American and English courts and in both jurisdictions the decisions were based on the sole fact that but for the violation of the rule and failure to stop the engines, the offending vessels would not have reached the crossing point of the two courses and the collision would not have occurred.

The most important of these cases is *The Admiral Schley,* 42 Fed. 67, decided by the Circuit Court of Appeals of the First Circuit, Judge Putnam writing the opinion. In this case both vessels failed to stop their engines, thus violating rule 16, the Schley coupling with it excessive speed and the absence of any lookout at her bow. As in our case, her fault was practically conceded and the question was whether the Mayer's violation of the rule also made her liable. The court goes on to say:

> "In regard to the fact that the 'Schley' did not stop as she should have done when she heard the first faint whistle from the 'Mayer', as the last paragraph of the International rule 16 required her to do, the 'Mayer' violated the same rule. Consequently, on this point, the vessels were mutually at fault; while, moreover, inasmuch as the 'Mayer' ran her bow into the 'Schley' under such circumstances that it is clear that, if she had run a few feet less, there would have been no collision, it is equally clear that if either vessel had obeyed the International Rules no injury would have resulted. It is true that it is sometimes difficult for a tug having a long tow to stop; but in this case the difficulty was of the 'Mayer's' own making.
>
> "Therefore, so far as rule 16 is concerned, not only must each vessel be held guilty of a contributory fault, in accordance with The Pennsylvania, 19 Wall. 125, 136, 22 L. Ed. 148, but it is also apparent that, *except for* the mutual fault of both vessels in this respect, there would have been no occasion for this litigation. It follows that the judgments heretofore entered by us must be renewed."
>
> *The Admiral Schley,* 142 Fed. 64, at 67.

The decision of the Circuit Court of Appeals in *The Schley* case meets every argument of our opponents. It holds squarely,

(1) That under article 16 the vital question is, admitting that the one vessel is plainly in fault for excessive speed and other offenses, would the other vessel, which failed to stop her engines as required by the rule, have reached the crossing point at the same time as the first, if she had stopped them on hearing the first whistle.

(2) That, if a vessel steaming in a fog fails to stop on hearing the first *faint* whistle of another vessel forward of her beam, she is liable as a contributor to the collision which subsequently ensues.

(3) That the "except for" or "*sine qua non*" rule still exists as it was laid down by the Supreme Court in *The Pennsylvania,* 19 Wallace 125, 136 (the Court of Appeals refers to the exact page, 136, on which this rule is stated), and that it is applicable to a violation of rule 16 even though the violation is not the "efficient cause" of the loss.

Application for certiorari was made to the Supreme Court where it was refused.

The Admiral Schley, 201 U. S. 648.

The Supreme Court must therefore have adopted its reasoning.

McMaster v. New York Life Ins. Co., 99 Fed. 856, at 861.

In any event is a persuasive authority on this court until the Supreme Court has overruled it.

The rule in *The Pennsylvania* case on which the Circuit Court of Appeals relies, is as follows:

> "Concluding, then, as we must, that the bark was in fault, it still remains to inquire whether the fault contributed to the collision, whether in *any degree* it was the cause of the vessels *coming into a dangerous position.* It must be conceded that if it clearly appears the fault could have had nothing to do with the disaster, it may be dismissed from consideration. The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. *Such a rule is necessary to enforce obedience to the mandate of the statute.*"
>
> *The Pennsylvania v. Troop*, 19 Wall. 136; 22 Law. Ed. 151.

The significant part of this statement of *The Pennsylvania* rule is that while there is no liability if it clearly appears that the violation of the statute could have nothing to do with the disaster, the violation is considered necessarily to have something to do with it if "*in any degree* it was the cause of the vessels *coming into a dangerous position*". In the case at bar our opponent frankly admits that ten times did his vessel fail to stop her engines on hearing the "Beaver's"

whistle and that the power of her engines during that period was driving her on a course which she knew in all likelihood would cross the bows of the "Beaver" and continued to drive her on to a most "dangerous position", i. e., squarely before the "Beaver" and so placed that as soon as she began to reverse she would be broadside on. Can it be said in the case at bar that the failure to stop in violation of the rule did not "in *any* degree cause the vessels to come into a dangerous position"?

The two vessels met at right angles and although thus squarely before the bows of the "Beaver" the "Selja" lays much emphasis on the claim that she was moving backwards at the moment of the impact. Such a consideration when the vessels were *in extremis* would have no weight, even if the question did not concern the violation of the specific injunction of a statute but merely involved the exercise of the discretion in navigation and hence was one of efficient causation. The "Selja" was not backing *away from* the "Beaver" but across her bows. The result of her forward movement in violation of the rules would not be overcome till her backing actually took her away from her opponent.

Another American case squarely in point applying the "but for" rule to violations of rule 16, is a decision of Judge Hough, the distinguished New York District judge. In that case, as here, the violation in question was more than five minutes before the collision, and yet the violating vessel was held in fault because "the injury would have been avoided if the rule had been

obeyed''. His discussion of the rule is most illuminating.

> ''He first heard the whistle he believes about *10 minutes* before the collision, but he repeatedly states that he heard it four or five times, on his port bow and getting closer, *before he stopped his engines.* It is thus positively asserted by both pilots that each distinctly heard forward of his beam the fog signal of a vessel the position of which was not ascertained. Yet Nichols heard that whistle repeated three times, and Dougherty four or five times, before they respectively stopped the engines of the valuable vessels they had in charge. I think this is a plain violation, by the pilot of each vessel, of article 16 of the Inland Rules. That article is mandatory in that it declares that a steam vessel in the position above described 'shall, so far as the circumstances of the case admit, stop her engines'. I see nothing in the circumstances revealed by the evidence which prevented stopping the engines of each vessel. Quite naturally counsel for both steamers have said very little about this point, which is pressed upon the court by the cargo owners. It is asserted as an authoritative declaration that the Supreme Court said in The Ludvig Holberg, supra, page 68 of 157 U. S., at page 480 of 15 Sup. Ct. (39 L. Ed. 620):
>
> '' 'No case has ever held that a steamer was obliged to stop at the first signal heard by her unless its proximity be such as to indicate immediate danger.'
>
> ''Undoubtedly that was the rule under the international regulations of March 3, 1885, article 13; but article 16 of the International Rules of 1890 (identical with the same article of the Inland Rules of 1897) has been differently construed in decisions binding upon me. In The St. Louis, supra, the Circuit Court of Appeals for this circuit held a much less flagrant violation of this article ground for the application of the rule:

"'That whenever it appears that one of the vessels (in collision) has neglected the usual and proper measures of precaution the burden is upon her to show that the collision was not owing to her neglect.' 98 Fed. 752, 39 C. C. A. 263.

"In re Clyde S. S. Co. (D. C.) 134 Fed., at page 97, it was held that a failure to observe the precaution imposed by this article 'creates a presumption of fault'; and the same rule was applied in El Monte, 114 Fed. 796. In the case last cited at page 800 is a reference to the proceedings of the Maritime Conference which adopted this rule, and I entirely agree with Judge Adams that it was put on the statute book on the recommendation of that conference in order that stopping at the first whistle should be imperative and because the conference and the legislature did not wish 'to leave too much to the navigator's judgment'. Any violation thereof should in my opinion create a very strong presumption of fault, and cast upon the offender the burden of showing by clear testimony that his error did not contribute to collision and subsequent damage. The rule is very forcibly stated in The H. F. Dimock, 77 Fed. 230, 23 C. C. A. 123, and I perceive nothing opposed to it in Dunton v. Allan S. S. Co., 119 Fed. 590, 55 C. C. A. 541, for in that case it plainly appears that the engines of the steamship were stopped 'immediately upon hearing' the first sound signal of the vessel with which she afterwards came in collision. Thus a presumption of fault attaches to both vessels for violation of the statutory rule. Neither has borne the burden laid on her thereby. On the contrary, the moderate speed at which each was going when the other's whistles were heard, and the narrow margin by which the bounds of safety were overstepped, are proof conclusive that, even with the Finance on the wrong side of the channel, *injury would have been avoided if the law had been obeyed.*"

The Georgic, 180 Fed. 863 at 870 and 871.

The "Selja" was a Norwegian ship, the "Beaver" an American; the collision took place on the high seas and is therefore controlled by the International Rules adopted by all the maritime nations. Rule 16 controls in Great Britain and in the absence of *The Schley* case her decision on a far stronger case in favor of the vessel violating the rule which occurred *ten minutes earlier* than with the "Selja" would be a powerful authority with American courts.

The following excerpt from *The Britannia,* 10 Asp. Maritime Cases, 68, states better than any summary of ours the treatment of the rule in England:

> "In this case the defendants say: 'Well, but it would not have made any difference at all if we had stopped, because when we heard it again at a later period and made it out, we did stop our engines, *and kept them stopped for some ten or fifteen minutes'.* It was argued that having stopped so long as that, it could not have made any difference if the engines had been stopped when the whistle was first heard.
>
> "That is an argument which one cannot possibly agree with. One might feel some difficulty in dealing with such an argument if one was not bound by rules and was free to consider mere contribution to the collision, though even in that case it would be very difficult to hold in such a case as this that there was no contribution to the collision by a vessel which did not stop in the first instance. But the rules have been dealt with over and over again and, before one can acquit them of blame, *one must see that the nonstopping could by no possibility have contributed to the collision.*
>
> "In this case, if the Britannia had stopped her engines in the first instance, *her progress would have been stopped* and she would not have reached

> the place of collision at the time she did, and the other vessel would have gone across her bows."
>
> *The Britannia,* 10 Asp. Maritime Cases, 68.

In *The Britannia* case the failure to stop the engines occurred more than fifteen minutes before the collision. In fact, after the failure to stop them at first, they were later "stopped for some ten or fifteen minutes". The court holds the Britannia liable because:

> "In this case, if the Britannia had stopped her engines in the first instance, her progress would have been stopped, and she would not have reached the place of collision at the time she did, and the other vessel would have gone across her bows."
>
> *The Britannia,* 10 Asp. Maritime Cases, 68.

The first whistle was evidently as "faint" in *The Britannia* case as in *The Schley* case and the case at bar. The same excuse was offered as that of Captain Lie here, namely, that the whistle sounded a long way off. The English court disposes of this contention, finally we think, in the following language:

> "If one were to hold that upon hearing a whistle which sounded to be distant a vessel was justified in not stopping, although its position was not ascertained, except that it sounded a long way off, every case in this court would be that the whistle sounded such a long way off that those who heard it were justified in not stopping the engines.
>
> *The Britannia,* supra.

Our opponent labored vigorously to show that in England the law of causation where a rule had been violated by one of the colliding ships, was different

from that laid down in *The Pennsylvania* case and other American authorities. He seems to contend that in England one has but to show that the *fault* has been committed and the offending vessel cannot escape liability under any circumstances in an English court.

The English authorities clearly show him in error as to this. *The Pennsylvania* rule is identical with the law as laid down in the English decisions at the time that case was decided (1874), and has been the law ever since.

In *The Britannia* case itself, the rule of causation invoked by the court is identical with that of *The Pennsylvania*. We print the two in parallel columns:

"But the rules have been dealt with over and over again and before one can acquit them of blame, one must *see that the nonstopping could by no possibility have contributed* to the collision." *Britannia*, 10 Asp. 68.	"In The Pennsylvania v. Troop, 19 Wall. 125, it was said that 'in such a case, the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, *but that it could not have been'*. The court asked whether it could be said that 'the absence of a mechanical foghorn could not *by any possibility have contributed* to the collision?', and answered 'We think not'." *The Martello v. Willey*, 153 U. S. 70.

The House of Lords in construing the Act of 36 and 37 Victoria, which is identical in effect in the statutes 57 and 58 Victoria, controlling in *The Britannia* case, says:

> "The presumption of culpability may be met by proof that the infringement *could not by any possibility have contributed to the collision.*"
>
> *The Duke of Buccleugh*, 7 Asp. 68 (1891).

The Court of Appeal says, in an opinion in 1907:

> "I therefore come to the conclusion that the Anselm was to blame in these three respects (violations of statutory rule), and that as regards two of them, namely neglect to give sound signals, 'when porting and when reversing—it is quite impossible to come to the conclusion that they had no effect upon the collision'."

The lower court had held the Anselm without fault on the ground that "the infringement of the rules had no possible effect upon the collision", to adopt his own words.

The decision was reversed on the reasoning given above.

The Anselm (1907), 10 Asp. M. C. 438, at 441.

The rule is similarly laid down and applied in the following:

The Corinthian (1909), Ct. of Appeal, 11 Asp. 264, at 269;

The Pitgaveney (1910), 11 Asp. 429, at 433;

The Reginald (1907), 10 Asp. 519, at 521;

The Aristocrat (1907), 10 Asp. 567, at 573.

It is thus apparent that the court in *The Britannia* case was applying, and properly applying, to the facts of that case the same rule that the Court of Appeals applied in the case of *The Schley* that Judge Hough applied in *The Georgic* and which Judge Bean applied here.

The facts in all four cases are the same. In each, if the steamer had obeyed the rule and stopped her engines, she would not have reached the point of colli-

sion. Judge Bean's decision is clearly in accord with the Circuit Court of Appeals for the First Circuit, Judge Hough, and the English Admiralty Court.

As significant is the fact that there is not a single decision which the industry of either of our opponents or ourselves can discover which holds contra to the above authorities, where rule XVI has been violated and "but for" its violation the collision could not have occurred.

II.

The Pennsylvania "but for" rule still controls violations of statutes and determines liability entirely apart from questions of proximate causation.

It was suggested that *The Pennsylvania* rule no longer exists and that despite its ancient potency we must now look to the facts to determine whether the contribution is something more than a *sine qua non* of the loss. The best reply to this is *The Schley* case itself, decided in 142 Federal, in the year 1905.

Both Judges Hanford and De Haven have given decisions reaffirming the doctrine within recent times. Judge Hanford's decision is probably the most striking of any of them. He says, repeating the language of *The Pennsylvania* case:

> "This was repeated and declared to be the settled rule in collision cases by the Supreme Court in Richelieu Nav. Co. v. Boston Ins. Co., 136 U. S. 422, 10 Sup. Ct. 934, 34 L. Ed. 398. The same rule was again reiterated in the case of Belden v. Chase, 150 U. S. 699, 14 Sup. Ct. 264, 37 L. Ed. 1218."

The Admiral Cecille, 134 Fed. 673, at 677, 678.

In that case the Multnomah was found in fault for excessive speed. The question was whether the Cecille, who was moored, without permission from the harbor master, in a certain place in the harbor of Tacoma, thereby committed a fault contributing to the collision. She was anchored at a place entirely proper if she had a written permission from the harbor master, but forbidden otherwise. The Multnomah was therefore

charged with knowledge that she might be there and to look out for her. The court says:

> "There is no probability whatever that the accident would have happened if the ordinance had not been violated by anchoring the bark in that part of the harbor which I have referred to as the prohibited zone. It is true that, if a permit had been applied for, it might have been granted by the harbor master; but it is not fair to assume that he would have granted such an application, and it is sufficient for the purposes of this case to find that the permit was not obtained, and without it the bark was prohibited from anchoring at the place where she was anchored."
>
> *Id.* 677.

Now it is apparent that it would not have made the position of the Cecille any more or less a contributing cause of the collision if her captain had had the piece of paper granting the permit to berth at that point. But the court, applying the "but for" rule of the Supreme Court in *Belden v. Chase, Richelieu Nav. Co. v. Boston Ins. Co.* and *The Pennsylvania,* referring to all of these cases, holds that the bark was liable, because "but for" her presence where she was in violation of the statute, the collision would not have occurred. So of the "Selja"—but for her failure to stop her engines she would not have met the "Beaver" at 3:16 p. m. and the collision would not have taken place.

Judge De Haven applied *The Pennsylvania* rule in *The Dauntless,* 121 Fed. 420, at 421.

In 1901, *The Pennsylvania* was applied by the Circuit Court of Appeals for the Fourth Circuit in the following language:

> "The present international rules require sailing vessels to use the fog horn 'in fog, mist, falling snow or heavy rain storm, whether by day or night'. The old rule (Rev. St. § 4233) required the signal to be given in fog or thick weather. The first revision (1885; 23 Stat. 438) made it in fog, mist or falling snow. The last revision (26 Stat. 320) added 'heavy rain storms'. This rule is imperative and was not observed by the schooner. This puts her in fault. *In the absence of all testimony on the part of the steamship,* it cannot be ascertained how far this omission on the part of the schooner contributed to her sudden appearance. Nevertheless, the positive breach of the statute puts her in the wrong. 'Where a vessel has committed a positive breach of a statute, she must show not only that probably her fault did not contribute to the disaster, but that certainly it did not do so; that it could not have done so.' The Pennsylvania, 19 Wall. 126, 22 L. Ed. 148."
>
> *Merchants & Miners Transp. Co. v. Hopkins,* 108 Fed. 890, at 894.

The Sixth Circuit also recognized the continuance of the rule in 1909, in (C. C. A.) *Hawgood Transit Co. v. Mesaba SS. Co.,* 166 Fed. 697, at 702.

The Fifth Circuit also in 1907, in (C. C. A.) *The Ellis,* 152 Fed. 981.

We do not deem it necessary to dwell on the elementary legal distinction between the *efficient* cause and the *sine qua non.* We ask, however, what was the use of Congress substituting rule 16 for old rule 18, which gave the master the discretionary control of his engines, if under the new rule we say, you still have discretion not to stop your engines until ten minutes after the time designated by the statute, in an attempt to ascer-

tain whether you are listening to a land fog whistle or an opposing steamer.

Unless rule 16 is mandatory and unless the punishment of the violation is made certain beyond the casuistries and disputes as to *proximate* causation, the change from rule 18, which controlled *The Umbria* to which we later refer, to the definite command of the later enactment, is a delusion and a sham.

III.

Further consideration of Rule 16. The "Selja" invokes the old rule existing prior to the passage of rule 16, which permitted the captain to determine when danger of collision in a fog required the stopping of the engines. Rule 16 determines the danger zone as being entered as soon as the whistle is heard from an unascertained position.

We have already shown that the "Selja's" failure to stop her engines was a *sine qua non* of the collision—that is, without this contribution to the chain of events leading to the disaster, it would not have occurred. The "Selja" makes as one of its answers to this that her non-stopping was not a violation of rule 16 because she had "ascertained" the position of the "Beaver" within the meaning of the rule.

The second paragraph of rule 16 provides:

> "A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over." (26 Stat. 320, Art. 16.)

It is counsel's contention that the rule leaves to the captain's discretion, after he has heard the opposing whistle, and does not know whether it is dead ahead or two points on his bow, whether it is moving from starboard to port, what the course of the opposing vessel was at any time till they were *in extremis,* whether it was two or twenty-five miles away, or even whether it

is a steamer or a foghorn, to determine that the position of the "Beaver" is ascertained and continue his vessel on towards the approaching whistle so ascertained (sic) for ten minutes, hearing her ten repeated blasts ten times before he stops his engines.

The libel alleges the hearing of a signal "seemingly dead ahead". The evidence shows the fact that the signal came a little on the port bow, and that the sound came nearer and nearer as the "Selja" moved ahead. It is admitted that the "Selja's" engine was not stopped until *fully ten minutes after the first signal* and then it was not stopped in obedience to any rule, but because, *in the face of danger of collision,* Captain Lie, as he says, thought it good seamanship to do so. Captain Lie was asked by his counsel:

> "Q. Why didn't you stop your engines when you heard the first whistle of the 'Beaver'?
> A. Well, because the sound was located as good as could be located in a fog and showed absolutely no danger of a collision." (Lie, 164.)

As, admittedly, it came from nearly dead ahead, a most dangerous quarter, we must assume that the captain deemed that its distance was so great as to preclude likelihood of collision at the time.

Captain Lie judged the location as well as he could in a fog, and *on that judgment,* based on a single blast of the whistle, assumed there was no danger of collision. *The event showed gross error.*

Counsel further inquired:

> "Q. Why did you stop your engines at 3:10 p. m., November 23rd?

A. I only call that good seamanship to do so. *I had then not only located the ship carefully, but I had also ascertained her course as near as it could be,* and I stopped the engines just because it was good seamanship to do so.

Q. Did you stop the engines at 3:10 because of Article 16?

A. No, sir.'' (p. 170-171.)

Now, compare Lie's cross-examination on these important facts:

(a) Take his statement that he had, at 3:10, *''located the ship carefully''.*

See page 1172 of Lie's evidence and read:

''Q. You recollect testifying three times, do you not, that you did not know it was a vessel until 3:10? A. Yes, I remember.''

(b) Take his statement that he had *''also ascertained her course at 3:10''.*

See page 1171 of Lie's evidence and read:

''Q. Did you think of her course *at all* as you came ahead during that time?

A. I commenced to think of the course *after I stopped my vessel,* yes, sir. * * * I said after I stopped my vessel, I commenced to think.

Q. Well, it is apparent you could not know what her course was if you did not know whether it was a vessel or not; that is right, is it not?

A. Yes, sir.

Q. Do you recollect testifying that, coming out of the fog, you could not tell what course the 'Beaver' was on until she had shown up in the fog? A. Yes.''

See also page 1172:

''A. Up to the time the 'Beaver' showed up in the fog, I could not tell what her course was.

Q. That was 3:15, was it not?

A. That was 3:15. I did not know what she was heading *then*. She may have been heading anywhere at that time."

Again:

"Q. How long was it after 3:10 before you sighted the 'Beaver'?

A. Five minutes.

Q. How were the engines going from 3:10 to 3:15? A. Stopped.

Q. When did you stop them? A. 3:10.

Q. What was the speed of the 'Selja' when you stopped the engine?

A. Three knots".

At page 1162, he says, three and a half to four knots, and in his log, four knots (Lie, 285). These admissions are a sufficient contradiction of the truth of the captain's statement that at 3:10 he had "located the ship carefully", and had "ascertained her course as near as could be".

Captain Lie also said that the whistles which he heard after the first whistle did not vary his judgment as to the "Beaver's" bearing and distance, and that if he had stopped his ship, he would not have thereby in any degree been assisted in more accurately judging them, because, as he repeats, he heard it "as good as it could be located in a fog at that time, and there was no local noises on my vessel" (Lie, 17).

This evidence is brought forward with the object of showing that the position of the "Beaver" at 3 o'clock, after the first whistle was heard, was "ascertained", and that consequently, under the rule as the libelant reads it, the "Selja" was not called upon to stop her

engines. It is summed up by Captain Lie in the following:

> "Q. Then your idea is that you should navigate with caution before stopping the engines; that is correct?
>
> A. If you have not located the whistle, well then you have to stop, but if you have located the whistle, *as far as it can be located in the fog,* well, then you do not have to stop, in my opinion" (Lie, 299).

If a master uses his judgment on hearing one blast and reaches a conclusion, right or wrong, Captain Lie seems to think that "ascertainment" within the rule has been reached, so as to justify going on.

Now, we have seen in the opening pages of this brief that at 3 o'clock the "Beaver" was supposed by Captain Lie to be *the fog signal at Point Bonita,* and that her whistle was supposed to come from the land. We beg to repeat:

Captain Lie was asked in his cross-examination:

> "Q. You recollect testifying three times, do you not, that you *did not know it was a vessel until 3:10?*
>
> A. Yes, I remember" (Lie, 1172).

See Lie, page 278:

> "Q. I say, you did not know whether or not the whistle of a steamer or the whistle of the foghorn off Golden Gate; that is correct, isn't it?
>
> A. That is correct, I did not know exactly.
>
> Q. Did you know up to 3:05 whether it was a ship four miles away or a foghorn twenty miles away? A. *I did not.*"

At pages 279, 280:

> "Q. Would you still claim that this whistle was in a definite ascertained position at 3:05?
>
> A. The *bearing* was definitely ascertained, yes.

Q. The distance from you, was that definitely ascertained at 3:05?

A. It was not exactly, but it was absolutely out of danger of collision.

Q. I am asking you with reference to the ascertainment of the position of the ship. Do you claim at 3:05 o'clock that the *position of the ship* in the water was ascertained to you?

A. *As good as it could be in the fog.*

Q. Did you know within fifteen miles of the distance at 3:05?

A. I did not think of the distance at that time, *but I had that in my mind, as I said, Golden Gate* * * *. She proved to be much nearer than I thought".

See page 281:

At 3:05 the captain testified "we were approaching the *foghorn,* yes" (Point Bonita foghorn).

See page 281, 282:

"Q. Captain, you said as nearly as can be determined in the fog. Do you mean to say it is any more difficult to determine the location of sounds in a fog than in clear weather?

A. No, it is the same, the sound. But I mean where you locate it in daylight you see it.

Q. In other words, the fog does not have any effect at all, according to your theory, on the transmission of sound through the air?

A. No, sir.

Q. It does not make any difference whether the fog is thick or thin?

A. It does not, to my knowledge."

We submit that the reading of the rule and the cases decided under the rule, the reason for its adoption and a comparison of its provisions with those of the old rule. all condemn Captain Lie's interpretation of its provisions.

III Cont'd.

The Rule.

The rule commands a steamer to stop, if she shall hear forward of the beam "the fog signal of a vessel, *"the position of which is not ascertained"*. This rule cannot be read to mean that, after hearing a whistle forward of the beam, the ship shall stop, unless she shall have ascertained *from that whistle* the position of the vessel giving it, and that, if she has so ascertained it, she may proceed on her way. It must be read (as its very words say) that, *except in the case of a vessel whose position is already ascertained,* any ship hearing a whistle forward of the beam *shall stop* her engines. This obviously must be done for the purpose of such ascertainment. It appears by many cases construing the rules that, after stopping, a ship *shall wait until,* after the exchange of repeated whistles, each shall know the position and intention of the other. Why should this precaution of repeatedly whistling be required after stopping, if the rule means to say that the position and course of the oncoming ship may be determined off-hand from the first, unexpected whistle coming suddenly out of the darkness? *To tell distance, direction and course on hearing one blast lasting a few seconds is manifestly impossible.*

An instance of the meaning of "ascertained" in the rule is found in *The Oravia,* 10 Asp. 434. In that case, the ships *had seen each other* immediately prior to the entering of a fogbank by one of them on a course which, on the supposition that she would not change her course, did not involve risk of collision. The other, afterwards, heard a direction whistle, from the fogbank, but did not

stop her engines. She continued her speed while in the open, and entered the bank at the same speed. These acts were charged as faults. The opinion of the court is epitomized in the report of the appeal in the House of Lords, which affirmed the decision that the failure to stop was not a fault (10 Asp. 525):

> "The Court of Appeal held that on the special facts of the case, *inasmuch as the position and course of the Oravia were ascertained before she was hidden by the fog* so that the vessels would pass clear port to port, the Nereus did not act wrongly in continuing her speed and in not sounding her whistle sooner."

The court will note that we have described the signal given by the Oravia as a *direction* signal, not a *fog* signal. Marsden, in the last edition of his work, emphasizing a true "ascertainment" under the rule, says:

> "It is submitted that had the *Nereus,* in the circumstances, heard a fog signal from the *Oravia,* instead of the port helm signal, she would still have been justified in not stopping, the position of the other vessel having been *ascertained* within the article."
>
> *Marsden on Collisions,* 6th Ed., p. 380.

Here the position had been ascertained by actual sight immediately before the fog shut down. Good seamanship was, in the court's opinion, determinable by the acts of the Nereus in view of the fact that she had positively, *by such sight,* ascertained the Oravia's position, and the Court of Appeal went so far as to say (having in mind that the Oravia had also seen the Nereus):

"in fact, if the Nereus had stopped or altered, except under some necessity, she might have hampered or impeded the maneuvers of the other vessel."

The Oravia, 10 Asp. M. C. 436.

Mr. Hall, British delegate to the International Marine Conference which framed the rule, afterwards adopted by all the nations, said on this point:

"But so long as the whistle appears to be before the beam, then, of course, it is necessary *to find out* the position of the vessel *which is not ascertained.* These vessels often travel in company. A steamer may have a steam vessel bound in the same direction as herself and she may be using her signal whistle continuously exchanging signals and the officer *would then know practically* the position of that ship. It would then not be necessary for her to stop."

Protocol, Int. Mar. Conf., Vol. 1, p. 455.

These considerations gain more force when we read the rule in the light of the reasons for discarding the old rule. The old rule, Article 13 (23 St. 441), consisted solely of the first paragraph of the present rule 16.

Art. 13. "Every ship, whether a sailing ship or a steamship, shall in a fog, mist, or falling snow, go at a moderate speed."

A ship's duty in approaching another, whether in the fog or otherwise, was provided for by

Art. 18. "Every steamship when approaching another ship *so to involve risk of collision,* shall slacken her speed, or stop and reverse, if necessary."

Under these now superseded rules it was held by the Supreme Court:

(a) That the mere hearing of a fog signal ahead did not require the ship hearing it to stop at the moment.

The Umbria, 166 U. S. 412;
Ludvig Holberg, 157 U. S. 480.

(b) That the rules of 1885 (to stop, etc.) in the case above set forth "are obligatory upon such vessels ap- " proaching each other from the *time the necessity for " precaution begins",* i. e., when "risk of collision is " involved".

The Wenona, 19 Wall. 41, 51;
The Nicholls, 7 Wall. 656;
The Johnson, 9 Wall. 146;
The Dexter, 23 Wall. 69.

(c) That under Article 18 of the rules of 1885,

> "it was his (the master's) duty to slacken her speed, or to stop and reverse, if necessary, *only* if her approach to the other ship involved risk of collision".

Ship Blue Jacket, 144 U. S. 371, 391.

The vice of the old rule which was expounded by the Supreme Court in the case cited was that, under its sanction,

1. A steamship was allowed, after hearing the whistle ahead of another ship, *to proceed* in a fog at a moderate speed *unless her approach should be seen to involve risk* of collision. If repeated signals should indicate further nearing of the ship, then, but not before, she should stop and drift until the approaching

steamer came in sight or, if necessary, she should reverse.

In other words, a ship, though aware of the presence of another, was allowed to keep on in the dark, and *to judge, as she went along at a moderate speed, what her movements ought to be.* All of these movements were *necessarily based on information gained from whistles coming out of the fog,* while both ships were under way, changing their positions and making confusion possible. It follows, of course, that under such a rule, in a case of collision, the master of the vessel charged with making an improper move could, if he had been moving slowly, properly answer that his action had been resolved upon after ascertaining, by careful listening, the direction from which the sound signal of the other ship came. And, legally speaking, if, by reason of sound deflection he had really heard the sound on his port side, though the ship giving the signal was actually on his starboard side, he could not be found guilty of fault, provided he had promptly acted upon the signal *as it came to his ears.* This reasoning was satisfactory to the courts so far as it exempted the master from liability where no fault had been committed, but to those who looked further than the mere execution of an existing rule of navigation, it was most unsatisfactory that ships should be allowed to navigate under conditions *which, notwithstanding obedience to the rules, imperiled life,* provided, of course, better rules could be made. This was done when the new rules were adopted.

The intention of rule 16 to take away from a master the right to proceed at all after hearing the first signal

without first stopping and ascertaining the other ship's position, is conclusively determined by the fact that the old rule 18, cited in *The Umbria,* was left out of the new rules. The old rule read:

> "Art. 18. Every steamship, when approaching another *so as to involve risk of collision,* shall slacken her speed", etc.

The rule of 1890 failed to make provision for this important condition because *it was the intention of the rule 16 to make it, as far as such a thing could be, impossible that this condition should present itself.* It could not, except in rare instances, present itself, if both ships *should stop* on hearing the first whistle and then, *after ascertaining each other's position,* navigate cautiously until danger of collision should be over. The old rule 18 was omitted for the patent reason that it might present a conflict with the new rule 16 and destroy the operation of the latter. The old rule permitted circumstances to intervene which made collision likely, though no fault might be chargeable. The new rule made collision almost impossible except upon a direct and wilful violation of its specific mandate.

The necessity and nature of ascertainment.

2. The danger of running on the faith of mere sounds in a fog has often been expounded.

The case of *The Umbria* says:

> "It is difficult to locate the exact position of a vessel in a fog, and still more difficult to determine her course and distance, and while a whistle continues to be heard so nearly ahead, it is manifestly unsafe to assume that she is upon a course that will take her clear."
>
> *The Umbria,* 166 U. S. 412.

Judge Brown in *The Lepanto,* 21 F. R. 651 at 658, a case involving very large interests, goes with deep learning into the question of the treachery of sounds in the fog and the legal effect of an error. He said:

> *"Erroneously locating a vessel by the sound of her whistle in a fog is not, however, necessarily a fault.* Sound like light is liable to be deflected from its original course by reflection, refraction or diffraction. When this happens, though the hearer locate correctly the direction of the sound as it comes to his ear, the source of the sound will be in a different quarter. Elaborate experiments on fog signals in this country and in England have established beyond question, apparent anomalies and contradictions in the transmission of sound through the atmosphere and a consequent liability to error as to the quarter in which the sound originates. Although opinions differ as to the comparative importance of the different agencies that produce these anomalies, all the observers agree substantially upon the fact of great aberrations in the course of sound and the audibility of fog signals."

The "Beaver", as appears from the evidence, did not hear the "Selja's" whistle until two minutes before the collision (Kidston, 798). This is not unusual. Under similar circumstances in another court, where it was shown that only two signals were heard, one at the commencement and one immediately before collision, the court said:

> "it must not be overlooked that sound, as is quite notorious, is a very difficult thing to be accounted for in a fog."

It absolved the ship from blame on this account.

The Aras, 10 Asp. Mar. Cas. 360.

> "If a sound signal *appears* to come from a certain definite direction, there is no liability for a

failure to make allowance for the deflection of the sound by reason of the fog, *and a vessel is justified in acting upon the apparent direction of the sounds.''*

Spencer on Collisions, Sec. 48;

The Oregon, 27 F. R. 751;

The City of Atlanta, 26 F. R. 456;

The Lepanto, 21 F. R. 651 at 658.

Collision, under such circumstances, was inevitable accident. The new rule was intended to change its character. The method of avoiding it was prescribed by rule 16. Since then, collision has become preventable accident.

Perhaps we may be allowed to add the words of Flood, Norwegian delegate at the Conference, the most bitter critic of the then prevailing rules for navigating in fog:

Thus spoke the representative of the home of ''Selja'', whose master has never been taught that sounds in a fog are fickle:

> ''I have seen, when the fog partly lifted, the steam come up from the steam whistle on the port side and I have heard the sound come up on the starboard side. The sound has gone round and followed the openings in the atmosphere and come up on the starboard side. Every practical seaman will agree with me that when he has expected to find a fog signal on the starboard quarter, he has often found it on the port quarter.''

Protocol Inst. Marine Conf., 458, Vol. 1.

Thus, it appears that the old rule, as construed by the courts, was deemed to allow a dangerous latitude. It

left too much to chance, and to the master's judgment which, under its sanction, was *not required to be exercised until risk of collision should be actually present.*

The object of the new rules was *to remove from navigation the dangers which we have referred to.* As little as possible was to be left to the judgment of the master as to the location of the sound; the danger of relying on the first whistle that came to the ear was *to be eliminated* and the ascertainment, *by stopping to listen,* of the position and course of an oncoming vessel, was *to be mandatory.* This might require five minutes, or twenty minutes, as the case might be. Rule 16 (par. 2), flexible in its terms, unmistakable in its intention, and commanding in its words, was the result of the Conference. The world has, by legislation, adopted it. It has been construed very often, more often in Great Britain than in this country, and always, we may say, in one way. *Indeed, international rules would be of no avail whatever, unless the courts of all of the countries read them alike.* The same words cannot be given different meanings, according as a ship enters San Francisco, New York or Liverpool.

It is now well settled that the requirement of rule 16, that every steamship, on hearing forward of the beam the fog signal of another vessel whose position is not ascertained, *shall stop her engines* and thereafter navigate with caution until danger of collision is past, *is mandatory.* Failure to obey the rule is sufficient in itself to create an absolute presumption of fault.

Captain Lie explained his failure to stop his ship's engines on hearing the "Beaver's" whistle on the

ground that the position of the latter was "ascertained". That fact was more definitely described by his saying that the sound of her whistle was "located as good as it could be *in a fog*". A similar claim of ascertainment was noticed by the court in other cases as "an ingenious argument" but it was not deemed persuasive.

El Monte, 114 F. R. 796 at 800;
The Bernard Hall, 9 Asp. M. C. 300 at 301.

In *The Umbria,* the Supreme Court held that under certain circumstances it was the object of the old rules that a steamship should reverse her engines and feel her way until the course of the other ship had been *definitely ascertained;* so in *The North Star,* 62 F. R. 71, Judge Taft, speaking for the Court of Appeals, held that the reversal, if necessary at all, should be made so as to "ascertain" *the exact position and course of the other vessel.* Rule 16 in the Norwegian law provides for its application in all cases where the position of the other vessel is not *surely* ascertained" (Lie, 167). "Ascertain", under rule 16, therefore, must be read to mean something more definite than locating a sound "as good as it could be in a fog" on hearing a single blast. No better evidence of failure to locate can be offered than the admitted fact in this case that the result did not disclose whether it was a land signal or a steamer's whistle that was heard, or whether it was three, or twenty miles away.

In *The Bernard Hall,* 9 Asp. Mar. C. 300, the President of the Admiralty Division defined the words "not ascertained". He said:

> "An attempt was ingeniously made to argue that in this particular case there was sufficient ascertainment of the position of the *Bernard Hall to free the Holyrood* from the obligation under that rule. I have had occasion to consider what was the meaning of those words 'not ascertained', and it appears to me that the real object of the words was to negative the obligation to stop in case of repeated whistles. *When whistle after whistle* is heard, the position is ascertained and, therefore, there is no obligation to stop for other whistles, but there is an obligation to stop with regard to the first whistle *because at that time the position is not ascertained.*"

In this case, the Holyrood stopped at the *second* whistle. The court said:

> "It is impossible to say it would not have been a material matter if she had done so",

i. e., stopped at the first whistle.

The American cases, as well as the English, recognize the fact that the Marine Conference which recommended rule 16 actually considered the propriety of so framing it as to compel a ship to *stop absolutely, to come to a standstill,* on hearing a whistle ahead. But, as the Protocol of the proceedings shows, it was finally agreed that the rule should require her to stop her engines and then navigate with care. Stopping the engines was directed in order that ascertainment of the other ship's position should be secured before proceeding further.

Referring to rule 16, the President of the Admiralty Division says in *The Rondane,* 9 Asp. M. C. 108:

> "It was an approach to what many persons had advocated at different times—namely, that in a fog vessels should absolutely stop. * * *

"This rule stops short of that. It does not say that a vessel is to stop and never move again in the fog. On the contrary, all she has to do is to stop her engines and then navigate with caution, and she is to do that because she hears forward of her beam a fog signal of a vessel, the position of which is not ascertained. *She is to keep them stopped until she can, by hearing further signals from the other vessel, ascertain the position of that other vessel.* The rule does not say that in terms, but that appears to me to be the meaning. The object, of course, is clear—namely, to give the vessel which stops her engines an opportunity of hearing better than she otherwise would do, and also to specially call the attention of those on board to the matter, so that they may be more acute to hear a second whistle and to locate it if possible. *Therefore, the duty of a vessel in a fog clearly appears to me to be to stop her engines when the first whistle is heard, for the purposes I have mentioned.*"

If it be necessary that a ship should be brought to a standstill in order that the course of the other be "definitely ascertained", *this must be done.*

The Minnesota, 189 F. R. 706 (Feb. 28, 1911).

In *El Monte,* 114 F. R. 796 at 800, the court says:

"An instructive discussion of the reasons for this amendment occurred when it was being considered in the International Maritime Conference of 1889, showing that the duty of stopping should be made imperative in order to avoid the danger of *leaving too much to the navigator's judgment.*" * * *

"Here was a vessel, going ahead in a dense fog at the rate of at least six knots, receiving the signal of another whose position and course were only conjectural, and yet kept on, with the result of bringing the vessels together, when an observance of the rule would have avoided danger."

Judge Hough, of the Southern District of New York, in a late case on the subject, agrees with Judge Adams as to the meaning of the rule and adds:

> "Any violation thereof should, in my opinion, create a very strong presumption of fault and cast upon the offender the burden of showing by clear testimony that his error did not contribute to collision and subsequent damage."
>
> *The Georgic,* 180 F. R. 863 at 871. See also chapter I for further consideration of this case.

In *The St. Louis,* 98 F. R. 750 (C. C. A.), two ferry boats were proceeding cautiously in a fog, sounding their signals. The St. Louis heard the Delaware's fog signal and instantly stopped and reversed her engine. The Delaware heard the fog signal of the St. Louis but did not stop. She waited *thirty seconds,* heard a second signal, stopped and reversed, giving alarm signals. Collision occurred. The Delaware was held to blame for not stopping on the *first* signal, though she postponed action only *thirty seconds.*

Counsel relies on *The Commonwealth,* 174 Fed. 694, but fails to note that in that case it appeared that:

> "The lookout said he reported the whistle and the steamer stopped; that he heard six or seven altogether to which he paid attention; that the first four whistles were 'one at a time'; that they then came 'two at a time' and after the two, another single whistle, which was the last he could remember; that the Commonwealth was in sight at the time of the last signal. The chief officer said he heard a whistle from the Commonwealth 'about abreast', 'right abreast * * * pretty far away' and they stopped the steamer."
>
> *The Commonwealth,* 174 Fed. 694, at 700.

So also in *Dunton v. Allan Steamship Co.,* where the court found:

> "That the first signal, which was one of two blasts, heard from the schooner, was just a few seconds before she loomed in sight through the fog; that immediately upon hearing these whistles, a signal was given to the engineer to stop, and within a few seconds thereafter, when the schooner loomed up, another signal for 'full speed astern' was given, and that almost immediately thereafter, the collision occurred."
>
> *Dunton v. Allan S. S. Co.,* 119 Fed. 590 at 591 and 592.

This caused the "slowing down" of the vessel. Counsel has failed to distinguish between stopping the *engines* which would slow her down and stopping the ship by reversing. Judge Hough points out this absence of violation of the rule in *The Georgic,* supra, 180 Fed. at 871.

We also refer the court to the following cases, all of which are interesting and directly in point:

Koning Wilhelm I, 9 Asp. M. C. 425;
The Cathay, 9 Asp. M. C. 35;
Challenge and Duc d'Aumale, 9 Asp. M. C. 497; affirmed Court of Appeals, 10 Asp. M. C. 105;
In re Clyde S. S. Co., 134 F. R. 95.

In *The Britannia,* 10 Asp. M. C. 67, the court said:

> "It appears to me that it was the positive duty of those on board the Britannia to stop their engines as soon as they heard that whistle for the first time. It is not true to say that because a whistle *sounds distant,* those on the ship hearing it are entitled to treat it as distant. Many cases in this

> court have shown that an apparently distantly sounding whistle is really close to. *Again, it is not correct to say that a whistle having been heard, can be located so as to be certain it is at a precise bearing on the bow.''*

Captain Lie's excuse for not stopping was that the apparent distance of the sound ''showed absolutely no danger of a collision'' (Lie, 164). He admitted afterwards that it proved to be nearer than he thought. His mistake illustrates the necessity and reason of the new rule. If he chose to take a chance, when he might have made sure, *and when the law directed him to make sure,* he cannot ask exemption on the ground of innocent error.

The court remarked (and this bears on Captain Lie's testimony to the same effect, Lie, pp. 169-170):

> ''In this case the defendants say: 'Well, but it would not have made any difference at all if we had stopped, because when we heard it again at a later period and made it out, we did stop our engines, *and kept them stopped for some ten or fifteen minutes.*' It was argued that having stopped so long as that, it could not have made any difference if the engines had been stopped when the whistle was first heard. That is an argument which one cannot possibly agree with. One might feel some difficulty in dealing with such an argument if one was not bound by rules and was free to consider mere contribution to the collision, though even in that case it would be very difficult to hold in such a case as this that there was no contribution to the collision by a vessel which did not stop in the first instance. But the rules have been dealt with over and over again and, before one can acquit them of blame, *one must see that the non-stopping could by no possibility have contributed to the collision.* In

> this case, if the Britannia had stopped her engines in the first instance, *her progress would have been stopped* and she would not have reached the place of collision at the time she did, and the other vessel would have gone across her bows."
>
> *Id.* p. 68.

These words apply to the "Selja". The "Selja's" master offers, as a justification for his reliance on the first signal and as an excuse for a violation of the rule, the fact that he learned nothing in the later whistles of the "Beaver" which he did not know when he heard the first whistle (Lie, 171); that is, as the facts show, *he knew nothing of the "Beaver's" position at the beginning and he learned nothing later* while he kept under way. In this, we see nothing except a most excellent argument for insisting that he should have stopped and waited until he did learn something. That was the intention of the rule.

Just as appears from the record in the case at bar, which shows the "Selja" to have been steaming rapidly toward the "Beaver", then almost dead ahead, the court, in the case last quoted, said of the facts before it:

> "It appears to me that when this vessel, the Britannia, was going ahead for four minutes, *she was in fact running into danger the whole time.* She must have been in fact running towards the other vessel the whole time. * * * *I have asked the Elder Brethren whether in their opinion, it was caution and prudent navigation to go on at slow speed, working steadily ahead, for four minutes without making absolutely certain of the position of the other vessel. They think it was not.*"
>
> *Id.* p. 68.

This case presents all the excuses which Captain Lie offers, under circumstances far more favorable to the master of the ship referred to in it than those shown in the case at bar. Captain Lie's statement that he could have gained nothing by stopping his engines is shown to have been founded on gross error. Indeed, it is clear that he devoted *ten minutes* to running forward at great speed into collision with a vessel ahead of him, when under rule 16 every one of these minutes should have been devoted, by stopping and listening, to ascertaining with certainty the then unknown position, distance and course of the "Beaver", or to resolving the unknown character of the whistle.

In *The Aras,* 10 Asp. M. C. 359, 360, the steamship Oakmore was proceding in "foggy" weather at only *two* knots; a whistle was heard ahead; *her engines were stopped* "and the bearing of the whistle was carefully " ascertained by compass by the master and each of the " officers on the bridge". When the whistle was found to be broadening on the bow, giving apparent safety, the engines were put to dead slow ahead, the Oakmore having come almost to a standstill. After twenty minutes, the Aras appeared, engines were reversed, but a collision occurred. The court held that the Oakmore was at fault for continuing even at dead slow speed, for twenty minutes because:

> "*it is so well known—so absolutely well known—that it is impossible to rely upon the direction of whistles in a fog,* that I do not think any man is justified in relying with certainty upon what he hears when the whistle is fine on the bows like this

> was undoubtedly, and is not justified in thinking it is broadening unless he can make sure of it."
>
> *The Aras,* 10 Asp. at p. 361.

The purpose of rule 16 was defeated by the "Selja's" failure to stop and listen. Captain Lie says "he had " located the sound as good as it could be located in " a fog and there were no local noises on my vessel" (Lie, 171). He had been reading the cases since his arrival. *The Koning Wilhelm,* 9 Asp. M. C. 428, said:

> "If you stop your engines you can hear better than you can when the noise of the engines and propeller is going on."

Said the President in *The Rondane,* 9 Asp. M. C. 108:

> "The object, of course, is clear, viz.: to give the vessel which stops her engines an opportunity of hearing better than she otherwise would do, and, also, to *specially call the attention of those on board* to the matter, so that they may be more acute to hear a second whistle, and to locate it if possible. Therefore the duty of a vessel in a fog clearly appears to me to be to stop her engines when the first whistle is heard, for the purpose I have mentioned."

Captain Lie fails to state that all the officers and any of the crew were consulted as to the doubtful whistle. The object of the rule requiring the ship to stop is " also to specially call the attention of those on board " to the matter." Somebody, if all had been consulted, might have suggested that a steamer's whistle blowing at a point *five or ten minutes' distant* was not a *land signal twenty odd miles away,* and by his advice to the master, have prevented him from rushing into danger. This omission in itself, was negligence which the rule was intended to obviate, viz.: the leaving of too much "to the master's judgment".

IV.

The Belgian King.

Thus far, we have not considered the case of *The Belgian King,* 125 F. R. 869, decided in 1902 by the Circuit Court of Appeals of this Circuit on appeal from the decision of this court. It was a case of novel impression under the new rules. Two or three cases had been recently decided in Eastern Circuits and in England, all upholding the mandatory nature of the requirement of rule 16 that on hearing the fog signal, forward of the beam, of a vessel whose position is not ascertained, a steamship must stop her engines, but as the voluminous briefs in the appellate court show, those cases were not presented. They had not reached counsel here. The case has not been cited or quoted from in any case as bearing on rule 16. It is not even found in the table of citations in *Marsden on Marine Collisions,* 6th Ed., the latest text-book. The court will remember that the Tellus and Belgian King collided in a dense fog. This court held the Belgian King to blame, saying:

> "The Belgian King was doubtless moving at a very fair rate of speed, but she did not discharge her whole duty in slowing down under the circumstances. *She should have stopped when she became aware of the presence of the other vessel, until she ascertained its position and then it would have been easy for her to have avoided the collision.*"
>
> *The Tellus,* 113 F. R. 525.

This court applied rule 16 truly and according to the uniform interpretation put upon it before and since. It was not applied to the Tellus, which also failed to

stop her engines, because on the evidence, though it is not so stated, the court must have found that her master, on hearing the first whistle, *had actually ascertained* the position of the Belgian King, a fact that was proved by the event, and that he then navigated with the utmost caution. The Court of Appeals, in affirming the decree, found the same fact in the same way:

> "When the whistle of the Belgian King was *first* heard, the position was sufficiently ascertainable by the Tellus to permit her to continue on her course at slow speed and give the direction signal that she was going to starboard."
>
> *The Belgian King,* 125 F. R. 876.

From the opinions of the two courts, it appears that because the Tellus, on hearing the first whistle, had ascertained the position of the Belgian King, she was not obliged under rule 16 to stop her engines, and because the Belgian King had not ascertained the position of the Tellus, her obligation under the rule was to have stopped at the first signal "while she ascertained its position". The rule enforced by the court is that enforced in like manner in all the cases. The case did not *condone a fault* in the Tellus when it failed to hold her guilty for not stopping her engines. It held that the condition had not presented itself which required her so to do, *and it held this expressly.* While the rule of the later cases (and they are unanimous) undoubtedly challenges the *sufficiency of the evidence* on which the district and appellate courts based their finding that the Tellus had ascertained the position of the Belgian King, the rule, on the facts, as found, was properly applied by them. In the case at bar, what-

ever the thought of Captain Lie was at the moment that he heard the "Beaver's" whistle, *the fact* was that he had not ascertained the position of the latter. He is not allowed under the new rule to plead an error in judgment.

V.

The Umbria and the St. Louis.

It becomes our duty to point out that the rule of *The Umbria,* though still valuable as an answer to an inquiry as to what is careful navigation, has ceased to be a factor in determining what steamships shall do, or what they need not do, on hearing a whistle ahead in a fog. *A statutory rule has taken the place of the law of the Umbria, which, before the rule was enacted, had declared the judicial idea of good navigation in a fog.* The court, we trust, will indulge us, if we again set forth rule 13 of 1885, and rule 16 of 1890, and give the explanation concerning the character and interest of each which will, as it seems to us, set at rest all doubt as to the proper explanation of the existing rule.

Rule 18 (1885) provides as follows:

> "A steamship approaching another *so as to involve risk of collision,* shall slacken her speed, or stop and reverse, if necessary."

Under this rule, *The Umbria* (166 U. S. 412) and the *Ludovica Holberg* (157 U. S. 60) held that a steamship in a fog was *not* obliged to stop on hearing the first whistle ahead. The duty to slow, or stop and reverse, it was said in *Ship Blue Jacket* (144 U. S. 371, 391), arose "*only* if her approach to the ship involved risk of collision", and generally, it was decided in many cases that the duty imposed by the rules became obligatory on a ship from the time the necessity for precaution arose, i. e., when "risk of collision" should be involved.

The Wenona, 19 Wall. 41, 51;
The Nicholls, 7 Wall. 656;

The Johnson, 9 Wall. 146;
The Dexter, 23 Wall. 69.

A moment's thought will recognize the salient features of the rule, as thus interpreted, to be:

(a) The act of slackening speed, stopping and reversing were required to be done "if necessary". It may be assumed that the necessity would be held to exist, whenever under the circumstances before him, a prudent and intelligent master would recognize its presence.

(b) The judgment of the master, in declaring the necessity to slacken or stop and reverse, was not called for until after he should have determined that there was "risk of collision", or, in other words, that he had reached a place of possible danger. This we may call the zone of possible collision.

The rule, therefore, did not require any specific act to be done, or to be left undone in any given case. It simply imposed the duty of exercising good judgment in all cases. For a failure to exercise such judgment, the master and his owners became liable, under general rules of law, for any damage suffered. We need not add that the burden of proof in all cases of negligence is on the plaintiff to show not merely the act of negligence, but the fact that such negligence contributed to the disaster, that is, to the collision.

All of the cases which we have cited only prove that rule 18 of the Rules of 1885 permitted a ship unreservedly *to enter into and navigate, but with care, in the zone of possible collision up to the moment at which*

the presence of another vessel should be disclosed. No difference was made between navigation in a fog, or in clear weather, except at times prior to the presence of risk of collision, that is, when no other vessel was present (Art. 13, Rules of 1885).

In these few words, we have stated the fundamental difference between rule 18 of the Rules of 1885, and rule 16 of the Rules of 1890. It was the object of the new rules to take from the master his liberty to enter a *place of risk. It made special provision for ships approaching in a fog, where none had been made before.* When that rule provided that a ship, hearing ahead of her a fog signal of a vessel whose position was not ascertained, should stop her engines, it ordained a course of action the very opposite of that permitted by the Rules of 1885.

It forbade a ship to enter into the zone of possible collision except after stopping and after ascertaining the position and course of the other ship. There was no requirement to do a thing merely "if necessary". *The direction to stop* was specific and mandatory. The zone of possible collision was in effect declared to be a place of danger, not to be entered until after stopping and obtaining the information necessary to obviate danger. It needs no argument to show that the "Selja" *in being,* whether with or without motion, in that forbidden zone without knowledge of the "Beaver's" movements, violated the spirit and letter of the rule just as much as she did in entering it without first stopping, as the rule required. In *The Schley,* 131 F. R. 434, the Court of Appeals condemned the Mayer for being in

the track of vessels outbound from Boston, she being inbound and having no justifiable reason for taking that route. Though she had violated no statutory rule, in this respect the court said:

> "Under these circumstances, the burthen rests on her to justify *her locality,* if she can do so."

There is one matter to which we have not referred. It is the dictum of the court in *The St. Louis,* 98 F. R. 750, in which, in deciding the case, the court enforced rule 16 and held the Delaware in fault for having postponed stopping her engines until thirty *seconds* after hearing the fog signal of the St. Louis ahead. The Delaware claimed that notwithstanding her admitted fault, she had reversed in time to gain a backward motion before the collision. The court said that if this had been, and if the St. Louis had been running at a high rate of speed, the Delaware would not have contributed to the collision (citing *The Umbria*) and would not have been to blame.

In the first place this dictum can have no application to the case at bar because the "Selja", instead of backing away from the "Beaver", was moving astern *at right angles across her bows* (245).

That was a case of a head-on collision, the vessels sailing, from the time the St. Louis first heard the whistle, in opposite directions on practically the same course, and hence were in front of one another when Article 16 applied.

If the St. Louis had stopped on hearing the first whistle, she would nevertheless still have been in the

course of the Delaware, and have been struck by her half a minute later. It is thus apparent that if the St. Louis had been backing through the water at the moment of collision, she would not have added anything to the impact, and, as they would have come together in any event, the failure to stop the engines 30 seconds sooner could not have contributed to the collision. In our case, however, the vessels were on *crossing* courses, and if the specific injunction to stop the engines had been obeyed, the "Selja" would never have come in front of the "Beaver" at all, and the "Beaver" would have crossed the intersection of the courses hundreds of feet before her.

As a matter af fact, instead of backing *away,* the evidence shows conclusively that at the moment of impact the "Selja" was backing at *right angles across* the "Beaver's" bows (opening brief, pages 104 to 111) and our opponents' witness, the expert Heynemann, admits that the scars on the "Beaver" bear out this theory (record, pages 423, 424). In *The St. Louis* case, backing in the water at once took her *away* from the opposing vessel, while in our case the backing was directly *across* the "Beaver's" course. Conceding that the backing of the St. Louis would have removed the element of contribution in the case, the backing of the "Selja" certainly did not diminish it in our own.

However, even if the dictum applied to the facts of our case, it is not authority particularly against a statute. The Supreme Court said, in *Carroll v. Lessees,* 16 How. 275, 286-7:

> " * * * this court has never held itself bound by any part of an opinion, in any case, which was

> not needful to the ascertainment of the right or title in question between the parties".

When the court in *The St. Louis* case said that, under The Umbria, a certain admittedly unproved state of facts would have relieved one of the ships, it stated what was unnecessary to its judgment. Its judgment in that respect carries no authority.

It is, however, worth while showing that the remark was inadvertently made. When *The Umbria* was decided, no statute rule existed which directed the action of vessels in a fog, after hearing a fog signal ahead. Rule 18 merely dictated the duty of a master to do certain things "if necessary", in all cases involving risk of collision.

In that case, it appears that the steamer Umbria was running at a very high rate of speed in a fog. The steamer Iberia was going at a moderate speed. Whistles were heard. The Iberia, in an effort to turn away from the oncoming ship's apparent course, changed her own which thereby became a crossing course. Then the Umbria appeared, bearing down on her, about 900 feet away. The Iberia went full speed ahead in an effort to escape, but failed.

The statement of the case by Justice Brown shows that the lower court had held both ships to blame, the Umbria because of her speed, and the Iberia,

> "first, because after hearing the first whistle of the Umbria, she changed her course without knowing the latter's bearing, course or speed, and second, because she violated Article 18 of the International Regulations by continuing on when she knew, or ought to have known, that the courses of the two

vessels were crossing and thereby involved risk of collision."

166 U. S. 407.

These were the points which the upper court decided in the cases. It held, first, that there was no fault in the Iberia's navigation when she changed her course. She certainly violated no statutory rule and, as an act of seamanship, her action was not condemned. Second, the court, also, found that the Iberia had been navigated at a proper speed up to the last moment, when, to avoid collision, she tried to shoot past the Umbria.

The majority of the court held that there was no fault of any kind in this act. Hence, there was no violation of any statutory rule. The minority of the court thought that if there was a fault, it did not contribute to the collision.

This decision has been three times interpreted by the Circuit Court of Appeals for the First Circuit to mean that the Iberia was *in extremis* and not to blame for anything she did after hearing the Umbria's whistle.

The Schley, 131 Fed. Rep. 433;
The Columbian, 100 Fed. Rep. 991;
The Gertrude, 118 Fed. Rep. 130.

It was said in the decision of the court under the circumstances above stated, and as a matter of proper, ordinary navigation, not of statutory rule, that two steamers running on crossing courses in a fog must so regulate their speed that each shall be able to stop before the point of intersection of their courses is reached. If one stops, it seems to follow that such vessel has done

her duty. She has ceased to move, and, so far as the collision is concerned, she is passive and does not contribute to it. But the Court of Appeals in *The St. Louis* entirely overlooked the fact, as we have shown it to be, that *The Umbria* case dealt with seamanlike conduct in navigation, not with a statutory rule.

As *The Umbria* was decided on the "ordinary rules of navigation" it is quite clear that the court in *The St. Louis* erred in applying its provisions, by way of dictum, to a case where they had themselves just admitted must be decided under the statutory rules. The Delaware would have had to show more to escape liability than the mere fact that she had begun to move back before the collision; she would have had to show that *by no possibility* had her failure to obey the rule contributed "in any degree to bring her in a position of danger."

The Pennsylvania, supra.

VI.

The "Selja's" counsel relegislation of rule 16.

None of the many cases cited, as has been seen, suggests that there is any legal excuse for disobedience of the plain terms of the rule. The necessity of facing this fact compels our opponents to seek a construction of the rule different from that of the cases. This they suggest in an important part of their brief.

They refer to rules 17, 18 and 19, and point to the use in those rules of the words "danger of collision" as indicating that the regulations (including Article 16, which does *not* contain the words) are not intended to become operative until *danger of collision arises.* But, as we have before shown, the International Rules were specially framed with the idea of removing the dangerous inconsistencies of situation found in the old rules, which, as regarded danger of collision, made no distinction in the management of steamships in, or out of, a fog. Rule 16 now refers exclusively to vessels *in a fog;* rules 17, 18, 19, refer exclusively to vessels in sight of each other. In the former, danger of collision is not visible to the eye, *and therein lies the peril,* not in any known condition of surroundings. In the latter, ships are upon an open sea, with all things visible. Now, let us see what counsel ask the court to say. The rule says:

> "A steam vessel hearing apparently forward of the beam the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances permit, stop her engines and then navigate with care until danger of collision is over."

It is argued by counsel, and the conclusion is reached, that the words "the position of which is not ascertained" indicate "an uncertainty of position" and that this "uncertainty of position" necessarily is "with reference to danger of collision". Consequently, it is further argued, unless a master can tell, after hearing the first whistle, or some succeeding whistle, that the other ship's position is uncertain with reference to danger of collision, he is not yet called upon to act and there is no need of stopping. However, if he concludes that there is no danger, he is not to blame, by reason of his failure to stop his engines. If he thinks there is danger, he must stop. We, then, find written into the rule by counsel, after "not ascertained", the words "with reference to danger of collision". In order that the new interpretation may be made acceptable, however, it is required that somewhere there be found a criterion by which shall be judged the responsibility which falls upon the master who undertakes to ascertain the position "with reference to danger of collision". Counsel argues that in such matters there must be reason, and this they find in the suggestion which they put forward substantially as follows:

That an approximation of accuracy as to both bearing and distance, showing that danger does not exist is required to be known before the vessel's engines shall be permitted to continue running at moderate speed.

Thus, our opponents would have this court re-enact the rules (we italicise the parts proposed to be legislated):

> "Article 16. A steam vessel hearing, apparently forward of the beam, the fog signal of a vessel the position of which, *with reference to the danger of collision*, is not ascertained *by an approximation of accuracy in regard to such danger* shall, so far as the circumstances of the case admit, stop her engines and then navigate with care until danger of collision is over."

When originally presented to the conference, the rule proposed that the hearing of the fog signal should command the *immediate stopping* of both *ships,* and would require instant reversing of the *engines* of both. This meant that they should come to a standstill. An American delegate, Captain (afterwards Admiral) Sampson, said:

> "I cannot agree with the gallant delegate from France as to the danger of making the rule to stop imperative. On the contrary, I think that if it is optional to stop, when necessary, great danger will arise. * * * It must be evident that if two ships are approaching and in danger of collision, *if it is made an absolute rule that when they hear the fog signals of each other, they shall both stop,* the conditions are the most favorable for avoiding a collision. * * * I think it would not be wise to leave this discretionary *and that it should be made obligatory on both vessels to stop. They thus move from the position at which they heard the signals the shortest possible distance. They make the chances of collision least possible."*
>
> *1 Int. Mar. Conf.*, 454.

Thus, it is seen that the object to be gained was time and space between the ships until navigation should become safe by the knowledge each should get of the position of the other. Counsel's rule leaves nothing of the intention of the original.

In the case at bar, though the distance between the ships was quite large when the "Selja" heard the "Beaver's" whistle, it was not as large as the "Selja's" captain thought. His error led him right up to the collision. The intention of the rule was to prevent such mistakes.

We submit that counsel's interpretation of the rule will not be accepted against the decided cases. Captain Lie, as a matter of fact, did not know that a steamship was ahead of him. He thought the sound was a land signal. Had he been positive it was a ship's signal, his action would have been doubtful, if his evidence is an index of his knowledge of the rule. When testifying before the inspectors he gave his version of the rule as follows:

"As soon as you hear forward of your beam, you have to slow down your engine and, if necessary, stop and navigate carefully until the danger is over." (Apostles, page 286.)

He did not refer to the duty to stop the engines. On his examination in this case, when his attention was called to the matter, he said that part 2 of Article 16 says:

"that if you have located a whistle in a certain place and far away, it is not necessary to stop, and if you have not located it, it is necessary to stop. * * * At that moment, if you have not located it where it is, if it *confuses* you and you don't know where it is, well, then it is necessary to stop". (Apostles, page 187.)

The captain's foggy ideas brought him to grief.

We cannot but feel that our opponents see that the rule condemns them, unless in some way it can be construed as Captain Lie construed it in the extract which we have given. Plainly speaking, the whole endeavor of our friends is to place within the borders of Article 16 of the old rule 18 of 1885. The effort to entirely eliminate the obligation to stop if the signal be safely distant, the effort to make that obligation operative, if at all, only when danger of collision is involved, upon the judgment of the master, and to apply the rule of *The Umbria* as to care in navigation, as a substitute for the stopping required by the rule, and finally to limit the fault to those acts only which are committed at the time of collision—all these things are evidences of counsel's hopes.

They cannot be accepted by the court as a fair interpretation of the rule. Except from counsel and Captain Lie, they find no support whatever. On its face, the court cannot accept the argument that a statute requiring a vessel to stop her engines on hearing a signal from a certain quarter, is relieved from liability for failing to stop, unless that failure occurs at the moment of collision.

It is a final answer to our opponents' attempt to apply the revamped Article 16 to the case at bar, that it would leave to the master the determination of the danger of collision even when, as here, the compass bearing of the "Beaver" remained constantly ahead, in *direct contradiction* of the Congressional enactment declaring that danger of collision shall be *"deemed"* to exist when the compass bearing of the approaching vessel does not appreciably change.

"Risk of collision, can, when circumstances permit, be ascertained by careful watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk shall be deemed to exist."

26 Statutes at Large, 326.

This rule governs even when the vessels are in sight of one another. It is but common sense that it would apply *a fortiori* in the fog where, as here, the ten successive fog signals are admitted by the libel to have been heard from almost dead ahead, before the engines were stopped. And the "Beaver's" bearing, as indicated by these successive whistles, did not appreciably change, risk of collision *must be deemed* to have existed. The "Selja" is thus shown to be in violation of Article 16 even with the twists of construction our opponent would give it, and her violation arose at least at the third whistle.

VII.

The rule that, where one vessel has admitted the violation of the rules, the fault of the other must be clearly made out, has no application here as the "Selja's" fault is not only proved beyond a reasonable doubt, but admitted by the libel. The "Selja's" faults are in no sense inconsiderable.

Much was said at the argument about the necessity of full proof of fault in an opposing vessel where a fault such as excessive speed has been admitted by or proved against the other. While we do not admit the existence of the rule as claimed by appellant, but we do not see its application here, where the facts are admitted in so far as rule 16 applies. Let us summarize them.

At 3 p. m. Captain Lie hears the "Beaver's" whistle seemingly dead ahead on a course S. 65 east (libel, page 14). As a matter of fact they were at all times blown from a vessel two points on his port bow. It is absurd to say that the position of the "Beaver" was then located as to *direction* from the "Selja".

After listening for some minutes, the sound "broadens" from dead ahead to somewhere on his port bow (Lie, page 232). This indicates that the "Beaver's" course is from starboard to port across the "Selja's" bow and hence going *away from* her. As a matter of fact the "Beaver" was at all times sailing from a position on the "Selja's" port side *towards* the "Selja". It is absurd to say the "Beaver's" position was ascer-

tained at 3 p. m. as to her *course.* The captain says her course was not ascertained till 3:15 (Lie, page 1172).

Until *ten minutes after* three o'clock, the captain of the "Selja" did not know that the whistle ahead *belonged to a steamer at all.* Let us not forget his testimony in this connection:

> "Q. I say, you did not know whether or not the whistle was the whistle of a steamer or the whistle of the foghorn off Golden Gate; that is correct, isn't it?
>
> A. That is correct, I did not know exactly.
>
> Q. Did you know up to 3:05 whether it was a ship four miles away or a foghorn twenty miles away? A. *No I did not.*" (Apostles, page 278.)
>
> Q. You recollect testifying three times do you not, that you did not *know it was a vessel until 3:10?*
>
> A. Yes, I remember." (Lie, page 1172.)

It is absurd to say that a mariner ascertained *anything* from an *approaching* ship when he thinks it a *stationary foghorn.**

Finally, the source of the sound was not ascertained as to its distance, for the foghorn in question (Point Bonita) was over twenty miles further off than the "Beaver" was at any time from three o'clock on. It is absurd to say Lie had ascertained the *distance* the "Beaver" was from him when, as he himself says,

> "She proved to be nearer than I thought" (p. 280).

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* Our opponents' brief at page 7 seeks to have the court believe that this was a mere "transitory thought", he having **momentarily** taken the sound for one of the fixed whistles at the entrance of the harbor".

He thinks the "Beaver" is dead ahead when she is not. He thinks the sound has broadened from dead ahead to his port bow, when it has not. He thinks the sound comes from a stationary foghorn, when it does not. He thinks it is twenty-four miles away when it is not a fifth that distance.

Can it be said that the position of a vessel is ascertained when a ship's captain thus *mis*-ascertains a foghorn?

He did not even guess rightly as to the distance as affecting risk of collision for, as he says, "she proved to be much further than I thought".

Can this be called an *"ascertainment"* within the rule of *The Britannia* where the whistle was heard for a longer time than here, or within the rule of *The Schley,* where the vessel was held in fault for not stopping at the "first faint whistle" forward of her beam?

Counsel's praise of the discipline on board of the "Selja" is hardly sustained by the evidence to which we have referred. What the master or his crew may have done after hearing the "Beaver's" whistle at 2:00 p. m. we cannot affirm, but in spite of charts, soundings, whistles and watches, captain, officers and crew, it is very clear that at 3:10 Captain Lie had just become conscious, though minute signals had been blowing ten times, that a steamer was coming upon him, from somewhere within two points of his port bow. Then, instead of reversing his engines (*The Minnesota,* 189 F. R. 76), he simply stopped his engines and allowed his ship to drift (for some of the time at the

same speed) until she came at right angles under the bows of the crossing "Beaver", exposing her 380 feet of length to a blow.

We submit that even allowing the utmost force to the major fault rule, the so-called minor violation of the statutory regulation is made out beyond a reasonable doubt. The "Selja" did not stop at 3 p. m. when she heard forward of her beam the whistle of a steamer, the position of which was not ascertained. Further, she did not do so at 3:01, or 3:02, or 3:03, or on any of the minutes up to 3:10, when she heard the "Beaver's" whistle. She clearly violated rule 16 and as clearly is within the *Britannia* and *Schley* cases.

Therefore no presumption can arise because of our frank admission of the "Beaver's" breach of paragraph 1 of article 16, in favor of the argument that the "Selja's" fault in violating paragraph 2 of the same rule must be deemed venial until *we* prove it to have been directly contributory to the collision. To so hold, would involve the ridiculous position referred to by the Court of Appeals in its first opinion in *The Admiral Schley,* 131 Fed. 437,* that liability would have to be adjudged according to the order in which the ship's cases are taken by the court.

In that case such a contention was made on the strength of the dictum in *The Umbria,* which vessel was shown, while steaming at 19 or 20 knots outside of New York, to have run into the Iberia. It was claimed by the Umbria that the latter was also in fault in hav-

* The rehearing of this case brought out the decision on rule 16 which we have before cited.

ing tried to cross the Umbria's bows. Judge Putnam says:

> "The Mayer relies on The Umbria, 166 U. S. 404, in which case she claims it was decided that as the Umbria was running under an excessive speed of about 20 knots, the alleged fault on the part of the Iberia, with which steamer she collided, could not be taken into account. But the fact is that a majority of the court held the Iberia was not in fault, while the other justices were of the opinion that if she had been in fault, the fault did not contribute to the collision. *Therefore, the decision is not effectual here.* We have sufficiently expressed our views of The Umbria in The Columbian, 100 F. R. 991, and in The Gertrude, 118 F. R. 130, where we said that The Iberia was *in extremis* from the moment she heard the signals of The Umbria. However, it is impossible to concede that there is any analogy between a tug like the Charles F. Mayer 'loitering' with her tow, and a steamer like The Iberia, which at least *was endeavoring to escape by some action on her own part.*"
>
> *The Admiral Schley,* 131 F. R. 437.

In the case quoted from, it was held that the Admiral Schley

> "should be regarded as in fault, which fault, on account of her extreme speed and lack of proper lookout, was grievous. Neither is there any question that her fault contributed to the collision. Indeed, *it was the prime cause*". (p. 434.)

The Mayer, however, was held to be, also, in fault for lack of good seamanship in being, without necessity, in the track of vessels leaving a port, which track was not in the line of her own voyage. The court held that it could not consider the relative intensity of fault in

the vessels, or the defense that one of them had the right to rely on the other not committing an outrageous offense against the rules. The court said, as regards the first of these claims, that

> "In ordinary cases, it would operate in reverse directions, according to which vessel's faults are first considered in ascertaining the causes of the collision."

And as regards the other, it said:

> "The Schley had as much right to assume that the Mayer would not be loitering on the path of navigation and to govern herself accordingly, as the Mayer had to assume that the Schley would not violate the International Rules. * * * the Schley was under no more obligation to assume that the Mayer would violate maritime rules than the Mayer was to assume that the Schley would do the same. If the second proposition were acceded to generally (viz.: that the ship proceeding at a high rate of speed, but for which collision would not have occurred, should be alone liable, notwithstanding fault on the other's part) there would hardly ever be a division of damages on account of the faults of both vessels." (p. 439.)

In the case at bar, *the weight of fault was with the "Selja", rather than with the "Beaver".*

The "Beaver", *on a course apparently clear of ships,* because no whistles were heard, proceeded at too great a speed. Within two minutes after gaining knowledge of the presence of the "Selja", her powerful engines were going full speed astern. This statement covers the whole fault of the "Beaver".

The "Selja", before hearing the "Beaver's" whistle, was running at too great a speed in a fog (Fault 1).

On hearing the whistle, she deliberately failed to stop as required by rule 16 (Fault 2).

The master failed to consult his crew as to the doubtful sound (Fault 3).

After hearing the whistle, she continued at an immoderate speed for ten minutes (Fault 4).

Knowing, or being required to know, that the whistle forward of the beam might be that of a ship crossing her bows from ahead, she did not take the precaution required by ordinary good seamanship to come down to mere steerage way or to stop, but instead ran rapidly towards the sound (Fault 5).

When she knew that collision from some unknown quarter threatened, and when it was only five minutes away, she did not reverse, but merely stopped her engines which were revolving at the rate of 3½ to 4 knots. With the force thus given, she ran across the "Beaver's" bows (Fault 6).

The "Selja's" faults *were all committed deliberately,* i. e., with the knowledge that a ship was, or might be, approaching, and that danger threatened. The "Beaver" *had no such knowledge.*

In re Clyde S. S. Co., 134 F. R. 98, illustrates the point we make.

In answer to a citation of the case of *The Umbria,* on the point that her excessive speed minimized the fault of the Iberia, the court said:

> "Here the faults of the Saginaw are, at least, equal to those of the Hamilton and would seem to be greater in that the Saginaw's speed was also excessive *and she violated the 16th rule of navigation after the presence of the other vessel was discovered.* The Hamilton in such respect was apparently without fault, as she stopped her engines when the other's whistles were heard, and reversed, although without much effect in view of her previous speed."

Captain Lie said in his testimony with regard to the "Beaver's" position at 3:10:

> "I did not locate exactly where she was, but I knew she was a good way off. I could see about two ships' lengths and my vessel was not moving very much ahead, so I was sure that as soon as she loomed up I could manage to get out of her way *if she was coming at the same navigation, at the same rate of speed.*"

Again, Captain Lie admits a glaring violation of the rule and asserts his readiness to take a chance. He knew of the "Beaver's" presence, the latter did not know of his. Yet Captain Lie was prepared to assume that the "Beaver" had heard his whistle and that she would slow down as he had done.

The language of the court in *The New York,* 53 F. R. 560, would be applicable here even if it were conceded by us (and we do not concede it) that a breach of paragraph 1 of rule 16 under the actual conditions by the "Beaver" was a greater breach than that of paragraph 2 of the same rule by the "Selja":

> "The great disparity of fault", says the court, "has invited and received the consideration it merits. But the impossibility of enforcing the great commandment of the law of navigation which *calls*

> *a halt* when risk of collision is involved, compels me to adjudge both vessels at fault."

The Supreme Court affirmed the judgment in *The New York,* 175 U. S. 187.

In the case at bar, we admitted the fact that the "Beaver" had proceeded at too great a speed in a fog. Liability necessarily followed. The "Selja" admits that she heard our fog signal from ahead, and that she did not know our position or course, or whether she was hearing a ship's or a land signal, and that she did not stop her engines. This admission is one of a palpable violation of paragraph 2 of the same article that condemns the "Beaver". It is quite clear that the "Selja" cannot *improve* her position at the "Beaver's" cost, by boldly saying: "You admit you were wrong, but I deny that my acts constituted a breach of the rule". The court cannot be asked to adjudge that, because the "Beaver" admits her violation, this admission tends to "show that the 'Selja' did not also violate the rule". The facts, in each case, are admitted. It is only when there is *serious doubt* as to the fault of one, that the presumption works against the other ship which admits or is proved guilty of actual fault. Here, the facts show fault in both. Each broke the same rule. The "Beaver" failed to obey the "shall" of paragraph 1; the "Selja" failed to obey the "shall" of paragraph 2. The "Beaver" was unconscious of impending danger; the "Selja" knew of the danger for fifteen minutes and rushed forward to meet it. Morally, the greater fault by far was with the "Selja".

VIII.

It is not necessary for the application of the "but for" or sine qua non rule that the violation of the statute should take place at the moment of collision.

Counsel place much reliance on the contention that although it may be shown that "but for" the violation of a certain rule when the vessels are maneuvering before one another the accident would not have happened, still if the act of violation does not occur at the moment of the collision the offender is not liable.

It needs but one illustration to show the logical absurdity of appellant's contention. Suppose two vessels are approaching in broad daylight, head on and a half mile apart. Suppose at this point vessel A blows one blast, and vessel B violates rule 26 by blowing two blasts, a cross signal. Suppose, as is very frequently the case, a collision occurs, say two minutes later, and that there is a flat contradiction in the evidence of the contending parties, as to all other questions of negligence. Would the rule not apply? Would not the court be obliged to say, under all the American authorities, that the burden on the approaching vessel is to show that the collision must have occurred even if she had not violated the rule? And yet the violation was two minutes before.

If libelant's contention be correct and the violation of the rule must be at the moment of impact, there can never be an application of *The Pennsylvania,* where the violation consists in failing to give passing signals.

There are no passing signals to be given at the moment of impact.

An examination of *The Pennsylvania* case, in which the rule is first laid down, clearly shows that the violation of a statutory requirement some time prior to the collision makes the violator liable even though the opposing vessel was grossly in fault. There the fault was the failure to blow a mechanical foghorn, required by the statute, some time prior to the collision. The opposing vessel heard the bell, which was rung in place of the horn, for a considerable period of time, but the court held that as the horn might have been heard even before the bell, the omission of the horn must be held to have contributed. That is to say, the cause which made the vessel liable, was the failure to blow the horn at a considerable distance of time before the collision. The mere tinkling of the bell just at the moment of impact or the blowing of the horn immediately before, could have had no causative relation to the collision.

The words of *The Pennsylvania* "at the time of the collision is in actual violation of the statutory rule" must be interpreted with the later words in the same paragraph:

> "The evidence in the present case leaves it uncertain whether if a fog-horn had been blown on the bark, it would not have been heard sooner than the bell was heard, and thus earlier warning have been given to the steamer—seasonable warning to have enabled her to keep out of the way."
>
> *The Pennsylvania v. Troop,* 22 Law. Ed. 151.

The "time of the collision" is here broadened by the court to include the prior time when the "earlier warning would have been given to the steamer—seasonable warning, etc."

Under our opponents' rule, the "Selja", although in fault, would not have been liable if she had stopped her engines just 200 feet from the side of the "Beaver", and had rammed the latter. That is, she had violated the rule, but had ceased to violate it at the moment of collision, though her headway took her into the side of the "Beaver" instead of broadside on before her.

The want of logic in the suggestion becomes the more apparent when we apply it in other cases. Suppose a steamer had failed to blow any fog signals till both vessels were *in extremis* and then began to blow them. Would it then be held that because they were blown at the time of collision, one must be forced to show that the prior breach of the rule was the proximate cause of the collision—that it would not be sufficient to show merely the prior violation and thus throw the burden on the violator to prove that the violation could not have contributed to the collision?

We submit that the true rule is that laid down in *The Britannia, Schley, Georgic* and *Pennsylvania* cases, i. e., that if the violation of the regulation initiates forces which subsequently contribute to the collision, and without which the collision would not have occurred, the vessel violating the regulation is liable even though her act is not the *proximate* cause.

IX.

The "Selja" violated the first paragraph of rule 16 in that she proceeded in a dense fog at an immoderate rate of speed. Considering all the circumstances, she should have stopped.

> Article 16. "Every vessel shall in a fog, mist, falling snow or heavy rainstorm, go at a moderate rate of speed, having a careful regard to the existing circumstances and conditions" (26 St. 320).

These words which were copied from the Rules of 1885 "deal with the general speed of ships in a fog"; as distinguished from "the special precaution to be observed after the proximity of another vessel has been ascertained by her signals".

The Umbria, 166 U. S. 412.

The moderate speed prescribed by the first paragraph is intended, therefore, for ships navigating in a fog which hear no whistles, or, if they do hear them, hear them astern or off on the quarter at distances forbidding thought of collision.

The "Selja" prior to hearing the whistle of the "Beaver" had been and, at the moment of hearing it was admittedly going at the rate of six knots at least. This rate, near the entrance of a harbor and in the course of northbound vessels, was clearly immoderate in itself and grossly immoderate in view of "the existing circumstances and conditions", to which the law enjoins the master to give regard.

S. S. Martello v. Willey, 153 U. S. 70.

We have in chapter IV set forth what we believe to be the truth regarding the "Selja's" location at the

time of the collision. It was over three miles from the place Captain Lie claims. Instead of moving towards the "Beaver" he had been lying at a standstill for some minutes before the "Beaver" came in sight. We take this story as he would have it, however, in treating this particular violation of the rules.

However inconsistent it may seem, he claims that although he knew "just exactly where he was" when he said he was off Point Reyes "because he worked in on his soundings until he got from one to the other and checked off on his chart" (page 1182), nevertheless, when he heard the "Beaver's" regular whistle he thought it was the Point Bonita fog horn off Golden Gate.* That is to say, he thought he was very near to the focus of the heavy shipping traffic in and out of San Francisco.

When he first heard the "Beaver's" whistle at 3 p. m., he says:

> "It first came into my mind that it might be one of the fog horns off Golden Gate (pages 163-162). It could have been only Point Bonita" which, he admits (page 162) was "over twenty miles away".
>
> Lie, pages 162-163.

He continued on his course, logging six knots, till 3:05, timing the whistle, when he concluded it was time to take precautions. At 3:05, with fog all round him and *possibly fog in his mind,* he says:

> "I considered that six knots was not moderate enough *under the circumstances.*"
>
> Lie, page 164.

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* The chart evidence shows that even then Point Bonita had a siren and not a horn.

After that time, *and for five minutes longer,* still in the belief that he had a land signal, not a steamer's whistle, before him (Lie, page 1170, again page 1186), he kept on, now at a slower speed, 3½ to 4 knots (Lie, page 1162), until, at 3:10, he knew a steamship was crossing his bows, and that there was danger of collision. Then he stopped his engines and drifted.

"Q. What did you have to attend to?

A. I think it appears that I heard that whistle, that I was timing that whistle, and *clearing up my mind as to that whistle.*

Q. That, you remember, occupied you till 3:10?

A. Yes, sir.

Q. To clear up your mind as to whether it was the whistle *of a ship or not?*

A. Yes, sir.

Q. You did not know until 3:10 whether it was the whistle of a ship or something else; that is correct, is it not?

A. Yes, but I knew then.

Q. At 3:10 sharp it came into your mind that this thing you had been hearing a minute apart was a whistle and not something else.

A. I don't say right on that second, it might have been 30 seconds before, or something like that."

Lie, pages 1170-1171.

See, also Bjorn, pages 114-115-116 (third officer).

Captain Lie had given no thought, he says, to the fact that the sound (as the libel alleges) was coming nearer and nearer. He would only admit that *he was approaching nearer to the foghorn on land,* not that the sound was also coming to him (Lie, page 281). The sound was on his port bow. He could think of it only as dead ahead.

"I did not think exactly what course the 'Beaver' was steering. I knew at 3:10 it was a vessel. Up to the time the 'Beaver' showed up in the fog, I could not tell what her course was."

"Q. That was 3:15 was it not?

A. That was 3:15. I did not know exactly what she was heading then. *She may have been heading anywhere at that time.*"

Lie, page 1172.

He had been previously asked:

"Q. Did you think of her course at all as you came ahead during that time?

A. I commenced to think of the course *after I stopped my vessel,* yes sir."

Lie, page 1171.

Captain Lie admitted that if off Point Reyes he would be in the track of the coastwise vessels (page 220), and hence, in any event, he was going at an excessive speed at six knots.

When he heard the whistle of the "Beaver" we find him in this further dilemma—either he believed he had just passed Point Reyes and was facing an opposing vessel and hence was in still deeper fault in continuing at six knots—or he believed he was right off Golden Gate in the thickest point of traffic on the Pacific Coast, and was in equally deep fault in continuing at this rate.

A six knot rate has been repeatedly held to be excessive.

The following are some of the cases:

The Martello v. Willey, 153 U. S. 70, 2 miles north and east of Sandy Hook, off New York, 5½ to 6 miles, held excessive.

Colorado v. H. P. Bridge, 91 U. S. 692, in Lake Huron, well away from any port, 5 miles excessive.

Pennsylvania v. Troop, 19 Wall. 125, 200 miles from Sandy Hook, seven miles held excessive.

The Dimock, 77 Fed. 226, C. C. A., 4½ to 5 knots held excessive while going through the Slue on the Massachusetts coast.

The Michigan, 63 Fed. 280 at 287.

> "*Five to six miles an hour is a questionable speed in a fog everywhere.* The event here demonstrates that it was a reprehensible speed in the waters of Cape Henry, and it was gross fault on the part of the steamer."

It would seem that under any theory of the case it is established that the "Selja" was not proceeding at a moderate speed, as required by rule 16.

Even in the absence of rule 16, she was at fault under rule 29. This reads as follows:

> "Nothing in these rules shall exonerate any ship or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

Good seamanship dictated the duty to stop his vessel on first hearing the doubtful whistle, if doubtful it really was, and to *wait until the character of that*

whistle was determined. He could tell that by waiting. If it was a ship, it would approach; if it did not do so, it must be stationary. He preferred to go towards it, though it was straight ahead, or nearly so. Clearly, in the doubtful issue of safety or danger which was presented to him, *he resolved in favor of danger.* He was prepared to take a chance.

A case perfectly analogous with that presented by the conditions testified to by Captain Lie, is that of a ship which is called upon to act when signals become confused.

In *The New York,* the Conemaugh's signals had not been answered, though thrice given. The court said, while in other respects finding no fault:

> "The duty of the Conemaugh at this juncture was plain. She should have stopped her engines after the second signal and, *if necessary to bring her to a complete standstill,* have reversed them. Nothing is better settled than that, if a steamer be approaching another vessel which has disregarded her signals, *or whose positions or movements are uncertain, she is bound to stop until her course be ascertained with certainty.*"
>
> *The New York,* 175 U. S. 187, 201.

The rule of the courts is inexorable that, if a steamship takes a chance of danger where the conditions permit of action which involves no danger, she does so at the peril of having to assume all of the consequences of her temerity. It is bad seamanship to do so, and a violation of rule 29.

The "Selja's" position is, however, far more serious than that presented by the facts of the case quoted from.

Captain Lie knew that, if a ship was before him, he was commanded *by the statute law* of every commercial nation, to stop his engines and determine the position of that ship before again turning them over. He cannot plead his blunder as an excuse for not stopping. It was his duty in any case to stop and find out. *He must, therefore, be charged with the knowledge which he would have obtained if he had stopped,* viz.: that a ship, whose position and course were unascertained, was before him. This being his obligation, his failure to comply with it compels him, if he would avoid responsibility, to prove (as required by the cases already cited) that the collision could by no possibility have been averted, even though he had stopped and ascertained the position of the "Beaver".

X.

The "Selja" was guilty of bad seamanship in not reversing at or before 3:10. In this respect, she violated rule 29.

We ask to be allowed to re-quote from Captain Lie's testimony the answers which bear upon this part of the case.

On direct,

> "Q. Why did you stop your engines at 3:10 P. M., November 22d?
>
> A. I only call that good seamanship to do so. I had then *not only located the ship carefully, but I had also ascertained her course* as near as it could be, and I stopped the engines just because it was good seamanship to do so" (Lie, p. 170).

On cross,

> "Q. So this was a deep strong whistle blowing intermittently at a space of about one minute apart from 3:00 to 3:10 and up to 3:10 you could not tell whether it was or was not a steamer's whistle or the whistle off Golden Gate; that is correct, isn't it?
>
> A. At 3:10, I knew it, yes.
>
> Q. Up to that time, you did not know it?
>
> A. No, up to that time I did not know exactly, but I made up my mind a little before 3:10 that it was a steamer and I stopped at 3:10 (Lie, p. 302).
>
> Q. Why was it you stopped your engine at 3:10? Didn't you think it was safe to go on with your engines at that time?
>
> A. No, sir, I made up my mind it was a steamer approaching *and I had also ascertained the course of her as near as can be*, and the bearing did not seem to change * * * (Collision was threatening.)

Q. Did you know she was crossing your bow at that time?

A. Well, she must have——

Q. You knew at what time—3:10?

A. Yes.

Q. You knew she was then crossing your bow? Now?

A. I had made up my mind that *she did not broaden* enough on my bow for me to proceed and therefore I stopped the engines'' (Lie, 329-330).

On further cross,

''Q. You did not know until 3:10 whether it was the whistle of a ship, or something else; that is correct, is it not?

A. Yes, but I knew then, not right on the second, it might have been 30 seconds before or something like that.

Q. Could you tell what course the ''Beaver'' was on during that time before you saw her?

A. I could not tell exactly what she was steering, no.

Q. What did you think she was steering about?

A. Oh, I did not think exactly what she was steering. I never thought of the exact course she was steering.

Q. Did you think of her course at all as you came ahead at that time?

A. I commenced to think of the course *after I stopped* my vessel, yes, sir.

Q. I thought you said you did not know whether it was a ship or not. How could you have thought about her course, if you did not know whether it was a ship or not?

A. I said after I stopped my vessel I commenced to think. * * *

Q. Do you recollect testifying that coming out of the fog you could not tell what course the ''Beaver'' was on until she had shown up in the fog?

A. Yes.

Q. So that up to that time, you did not know what course she was on?

A. Not exactly, no.

Q. That was 3:15, was it not?

A. That was 3:15. I did not know exactly what she was heading then; *she may have been heading anywhere at that time.* (Lie, pp. 1170-1172).

Q. Did you know at 3:13 where her course was going *to cross yours?*

A. *No, I did not.*

Q. So that as a matter of fact, you really did not have that vessel located as to where she was in the water at 3:13, is that correct?

A. Her bearing seemed to be the same, but she broadened a little bit. I did not locate exactly where she was, but I knew she was a good way off. I could see a couple of ship's lengths and my vessel was not moving very much ahead" (Lie, 330).

The two ships had been from the begininng, as is admitted, on crossing courses. The "Selja's" course was S. 65° E. magnetic, the "Beaver's" was N. 86° W. Captain Lie, to meet the criticism that must follow the admission that he kept straight ahead under such circumstances, says that the whistle "broadened a little bit", meaning that there was a slight indication that the "Beaver" was turning away from him. This was at 3:13; yet a moment before, at 3:10, he knew that "she did *not* broaden enough on his bow to enable him to proceed, so he stopped" (Lie, 330).

Captain Lie "commenced to think" about the "Beaver's" course *after he had stopped his engines* (Lie, 1171). He says she must have been crossing his bows. He had no idea of her course at 3:13, *three minutes*

before the collision, except that "her bearings seemed to be the same" and that *"she was a good way off"* and at 3:15, *one minute before the collision,* so far as he knew, "she may have been heading anywhere at that time". Yet it had not occurred to him to reverse his engines, though he was in imminent danger, a fact which he should have known. Though in one sentence he says that at 3:10 he had located the ship carefully (Lie, 171), he admits in another that at 3:13 "I did not locate exactly where she was, but I knew she was a good way off" (Lie, 330). He proved to be all wrong.

The preliminary sailing rule of Article 17 says:

> "Risk of collision can, *when circumstances permit,* be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist."

Apparently, Captain Lie was using this rule as a means of information, but failing to act on the knowledge to be gained by it. The rule is, of course, easily applicable by sailing vessels in sight of one another, or by steamers in sight of lights, but it cannot be relied upon where the compass bearing of an illusive fog signal is taken as indicating a ship's course.

> "The steering and sailing rules can be applied with effect only when the *position and course* of the one ship are approximately known to the other. *They are therefore frequently inapplicable in a fog. In that case, each ship must comply with Rule 16."*
>
> *Marsden on Collisions,* 5th Ed., 384.

Captain Lie had, at no time, the excuse for continuing ahead that the "Beaver's" signals sounded from a direction that indicated she would pass in safety. These signals were from dead ahead, or a little on the port bow. *He would never have steamed toward them if he had not supposed he was going towards a distant land signal whose loud blast, carrying a great distance, he was hearing.* He considered himself quite safe, therefore. As he says, he had not, *as late as 3:10, given a thought* to the "Beaver's" course. At 3:13, "she might have been heading anywhere", for all he knew. At 3:10, he became aware of his blunder and that a steamer was upon him, he knew not from what direction. He had not thought of a steamer. Yet Captain Lie would have the court believe that, in a collected manner, he reasoned that the 3½ to 4 knot rate which his ship had at 3:10, would run down, before the "Beaver" could get to him, to such extent that he could easily escape her, provided the "Beaver" should in like manner have spent her force at the time the two vessels should sight each other. But, as it happened, the "Beaver" had been prevented by the fog from hearing the "Selja's" signals, consequently, *she had no notice of danger and of the duty to slow or reverse in face of it.*

The case of the *Koning Wilhelm,* 9 Asp. M. Cases, 427, is in point. There the engines of both ships had been "working dead slow". They could see two ship's lengths in the fog, as Lie says he could. "That short distance," said the court, "*indicates the density of the fog*" (p. 427).

The Bittern, one of the steamers, was found at fault at once. The case of the *Koning Wilhelm I* was considered. The decision of the court, in its summary, states the law very clearly:

> "*The Koning Wilhelm* in my opinion and in that of the Elder Brethren, *distinctly contributed to the collision* in two ways. First by her master not stopping her engines when he ought to have stopped them in that dense fog with so many vessels about." (p. 428.)

(The court on page 427 found this fault to be one in good seamanship, as well as a breach of Article 16.) It continued:

> "*Being in doubt,* as he was on his own admission, he ought to have stopped his engines and when he found shortly after, as he did find, and as he admitted he found, that the other vessel was porting and that her whistle signals were narrowing on his bow, indicating to him a position of extreme danger —the position being that a vessel which could only be seen at about 150 yards was porting across his course—he ought not only to have stopped his engines, *but to have reversed them.* That is not only required by the rules, but is necessary for proper navigation."

The rule which we are considering is Article 29, which provides:

> "Nothing in these rules shall exonerate any vessel, or her owners * * * from the consequences * * * of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case."
>
> 26 St. 320, Art. 29,

Spencer on Collisions, says:

"It may be stated, as a general rule, that it is necessary for a steamer to stop and reverse in a dense fog when whistle or fog signal is heard approaching on either bow, and apparently in the vicinity, unless the fog signals of the approaching ship unequivocally indicate that it is headed so as to pass clear, without involving risk of collision. Where two steamships are invisible to each other in a dense fog, and find themselves drawing near together, ordinary prudence requires them to stop or reverse, without waiting until they become visible to each other, unless there are attending circumstances of unusual character which make it more dangerous to stop or reverse than to advance. Such danger, however, must not be imaginary or speculative, but must be a positive, present and imminent one. In the absence of such imminent danger as prevents stopping or reversing, it is the duty of steamers approaching on opposite courses to stop until they come to a clear understanding with regard to their respective position and courses; and where there is any confusion of signals or any other apparent risk of collision, it is their duty not only to stop, but to reverse until all way is lost."

Now, the captain admits that from the hearing of the first whistle, *his ship approached the sound* which turned out to be the "Beaver's" signal. She approached it rapidly because she was going at six knots, while it was approaching her at the rate of twelve knots. The sound was apparently *dead ahead,* or very slightly on the "Selja's" bow. Most of the time, if he had stopped his ship's engine—*at any time up to the moment before the "Beaver" loomed up in the fog, if he had reversed his engines*—the master of the "Selja" could, certainly have avoided the collision. Though

conscious at 3:10 of the fact of an oncoming ship and of imminent danger from right ahead, he merely stopped his engines and allowed his ship to drift rapidly towards it. The rule laid down by the *Umbria* under the Rules of 1885, is that on hearing two or three whistles ahead, a steamer should stop (166 U. S. 404). The "Selja" heard ten whistles before she stopped. In *The Minnesota,* 189 F. R. 706 (Advance Sheet, Nov. 2, 1911) the district judge for the Southern District of New York said (p. 709):

> "As soon as she heard the first blast of a steam whistle *directly ahead,* in a dense fog, Article 16 of the International Rules required that she stop her engines and then navigate with caution until danger of collision was over. In my opinion she was not navigating with caution when she simply stopped her engines *and drifted on directly towards the steamer sounding the whistle ahead.* * * * I think she should have reversed as soon as she heard the first blast ahead."

The conditions and the possibilities of the situation are illustrated in the opinions given in the House of Lords in *The Ceto,* L. R. 14 Ap. Cas. 670.

That case involved the question which we are considering from two points of view, viz.: the application to the facts of the old Article 18 (Rules of 1885) which required a ship approaching another "so as to involve risk of collision to slacken her speed or stop and reverse, if necessary", and of the rule requiring a master, under all circumstances, to exercise good seamanship.

We submit the following passages taken from the opinion of the judges in the case referred to. They aptly illustrate the conditions in the case at bar and point to what Captain Lie should have done.

Lord Watson said:

> "When the approaching vessels are enveloped in fog, and cannot see each other, the rule must, in my opinion apply with greater stringency Their respective officers are in that case, guided solely by their sense of hearing, which may enable each of them to speculate with more or less accuracy as to the position of the other vessel at the time when its fog whistle is heard. But the direction from which the whistle comes can afford no indication of the course of the approaching vessel unless the sound is repeated, and its bearing is, on each repetition, carefully observed. Even then, the bearing of the vessel and its courses are more or less matters of speculation, and cannot be ascertained with the same certainty as if her hull or lights were in view. When two steamships, invisible to each other, by reason of a thick fog, find themselves gradually drawing nearer, until they are within a few ships' lengths, they are, in my opinion, within the second direction of Rule 18, and each of them ought at once to stop and reverse, unless the fog signals of the other vessel have distinctly and unequivocally indicated that she is steered on a relatively safe course, and will pass clear, without involving risk of collision. In the absence of such indications, it humbly appears to me that to negative the necessity for stopping and reversing when the vessels are near to each other, though still unseen, would be to thwart the very purpose for which the rule was enacted." * * *

After referring to various decisions, the judge said:

> "In the first of these cases, the present Master of the Rolls said: (7) 'It may be laid down as a general rule of conduct that it is necessary to stop and reverse, not indeed every time that a steamer hears a whistle or foghorn in a dense fog, but when in such a fog it is heard on either bow and approaching, and is in the vicinity, because there must then be a risk of collision.' To the proposition so stated I entirely assent. When the approaching vessel is nearly ahead, the duty to stop *and reverse is obvious;* but it appears to me to be equally imperative when the other vessel is drawing near upon either bow. It matters not whether the bearings of the approaching ship be one point or four; either position is fraught with danger of collision if it continues to advance without change of bearing."

Lord Hershell said (p. 695):

> "I think that when a steamship is approaching another vessel in a dense fog, she ought to stop, unless there be such indications as to convey to a seaman of reasonable skill that the two vessels are so approaching that they will pass well clear of each other."

Lord Bramwell sums up a situation exactly like that under which Captain Lie acted (p. 689):

> "He did not know where the other vessel was, nor what she was doing; that he *thought* something, that he *speculated* and that he had acted on his opinion instead of *making sure* by stopping and reversing. There was no reason why he should not; it was a calm and no other vessel was near."

If the "Selja" ought to have reversed and did not do so, she was guilty of a fault in seamanship. Re-

versal would have prevented the collision. Drifting under a stopped engine took her into the "Beaver's" course a fraction of a minute before the "Beaver" reached the point and struck her. Safety lay in reversal, if she had performed that duty. It is to be said that, though the rule of good seamanship was violated by the "Selja" though she was brought into a spot at which some seconds later she was struck, the fact that when struck she was lying still, or was working away from the spot is sufficient evidence that her failure to reverse did not contribute to the accident? *De minimis non curat lex.*

XI.

The "Selja" violated Article 15 for a considerable time preceding the appearance of the "Beaver" in not giving the two blast signals indicating that she had no way on her.

This rule provides as follows:

Article 15 b. A steam vessel under way, but stopped and having no way upon her, shall sound at intervals of not more than two minutes, two prolonged blasts with an interval of about one second between.

All the foregoing assumes that Captain Lie has established his claim that the "Selja" had just come to a standstill from a course of south 65 east (straight for the lightship) at a point about 2½ miles from Point Reyes, when the "Beaver" appeared out of the fog; and hence that the "Selja" was justified in not blowing a two-blast signal prior to this time to indicate that she had no way on her.

A careful analysis of the testimony shows conclusively that the collision occurred about six miles southeasterly from Point Reyes at a point which the "Selja" could not positively have reached in time after the alleged passing of Point Reyes and at the speed sworn to by her captain. That instead of heading S. 54 east—a point (11 degrees) south of her course of S. 65 east—when the vessels sighted one another, as claimed at one place by the "Selja's" captain, the "Selja" was then lying in the trough of the westerly sea, pointing about due south, and at right angles to the course of the "Beaver", and that she had been at a standstill

for some minutes without blowing the necessary two blast signal. That the blowing of the one blast, thus indicating the "Selja" had way on her, led Captain Kidston who heard it twice on his starboard bow, to believe that she might be crossing the "Beaver's" bow, and hence to reverse full speed, thus throwing his bow to starboard as he proceeded under reduced momentum and causing him to collide. Whereas if he had known the "Selja" was at a standstill, as would have been indicated by two blasts, he would have simply sent the "Beaver" over a little to port and cleared the "Selja" by a good distance.

Before undertaking a critical examination of the testimony of all the witnesses, it is well to consider the extraordinary story told by the "Selja's" officers. They say that after some weeks sailing from Japan they knew by distance run and observation that they were somewhere off the California coast; that they entered a fog at one o'clock of the morning of the 22d of November, that is fourteen hours before the collision; that they changed their course five times during that period, as follows: South 70 east till 8 A. M., then due west magnetic till 9:30, then east by north till 11 A. M., then due west again till one o'clock, then south 60 east till 2:50 P. M. (Lie, pages 155-156); sometimes sailing before the sea, then again turning clean around and sailing in an opposite direction, heading into it, sometimes at full speed, sometimes at half speed, and sometimes at very slow speed.

They say that at 2:30 while proceeding at half speed, they heard a *siren,* blowing for 2½ *seconds,* at intervals

of *thirty-five* seconds, which they at once recognized as the Point Reyes whistle, on which they took bearings and at 2:50, after examining their chart changed their course to south 65 degrees east "straight" for the lightship off Golden Gate. This change was made before any soundings were brought to the bridge, though there was an attempt to show that the soundings being taken on the poop and then unknown to the bridge, did support the captain's theory as to where he was.

On cross-examination the astounding fact was brought out that the Point Reyes fog signal had been changed without Captain Lie's knowledge, and that the book of directions he had bought at Hong Kong, and on which he was relying, described it as a *steam whistle* with a *five-second* blast, blown at *seventy-second* intervals.

Would it not tax the strongest credulity to believe it? Here a captain has been sailing his vessel fourteen hours at varying speeds in the fog in which she had changed her course five times, in directions sometimes diametrically opposed. He suddenly hears a *siren* of a certain blast and interval, of the existence of which he can have no human knowledge, and thereupon, knows that the siren has been substituted, while on the voyage perhaps, for a *steam whistle* of entirely different blast and interval and that therefore he must be off Point Reyes! And further be so certain that he thereupon sets his course, *before he has brought to him any nearby soundings,* for the lightship, a fixed point seven and a half miles off the Golden Gate, and then some 22 miles distant from the "Selja".

This significant testimony of Captain Lie is as follows:

"Mr. McClanahan. Are you speaking of Point Reyes?

Mr. Denman. Yes, Pt. Reyes.

Capt. Lie. A. Oh, Pt. Reyes — I beg your pardon. I thought you were speaking of Pt. Bonita.

Q. No, Pt. Reyes.

A. *The book I had said that it was a a first-class steam whistle, a five-second blast and 70 seconds interval.*

Q. As a matter of fact, when you got there there was no steam-whistle there? A. No. I found that out.

Q. And what was the blast you heard?

(Objection by Mr. McClanahan.)

A. I found it to be 35 seconds interval, and a blast of about 2 or 2½ seconds.

Mr. Denman. A whistle or a siren? A. *A siren.*

Q. As I understand it, you changed your course at 2:50?

A. Yes, sir.

Q. That was before the first officer came on the bridge, was it not?

A. Yes, sir.

Q. And you changed your course on the two-whistle bearings from a siren that blew what?

Mr. McClanahan. I object to the question as improper cross-examination on rebuttal.

A. 35 seconds interval and 2 or 2½ blast, I don't remember which. But I would like to say——

Mr. Denman. Just a moment. What direction did you set your course for?

Mr. McClanahan. That is objected to as improper cross-examination on rebuttal.

A. I set it toward the light ship."

Record, pages 1274 and 1275.

"Q. When you heard it abeam at 2:50 did you do anything?

A. Yes, sir.

Q. What did you do?

A. I went into the chart room just soon after that; the chief officer came with the data of the soundings and also with his log of the distance run, and I went into the chart room and put it out."

Record, page 158.

Mr. DENMAN. Q. He had several soundings less than 30?

Capt. LIE. A. Yes, I remember that he said the least sounding he had was 28. I remember that, too.

Q. The least sounding he had was 28. *But before you had received any sounding you had changed your course?*

A. *Oh yes, I had changed my course because then I had had my bearings.* I did not lay them off, but I had my Fort Point bearing as well just to check up so I would see approximately how far I went off.

Record, page 1201.

The "several soundings", if any, brought by the first officer, were those taken at 2:30, 2:35 and 2:40 as the first officer was relieved and the third officer took his place at the sounding machine from 2:45 on. The latter says that every sounding from 2:45 up to the collision was the same, i. e., 35 fathoms (deposition Larsen, page 80), entirely inconsistent with any course of S. 60 east, giving several soundings of under 30 fathoms in the preceding quarter of an hour, as an inspection of the chart will show.* Six soundings of identical depth

* Lie attempted to establish a different theory when pressed on cross-examination, saying the slips had been sent to him by the first officer. As shown by his Ex. 1, the only slips of any importance prior to Larsen's trick at the machine at 2:45, were those of 2:40, 2:35 and 2:30, as before that the soundings were too deep to be of any significance. As the first officer himself brought several, those sent by him from time to time before he came on the bridge must have been prior to 2:30 and of no assistance in locating the vessel.

would seem strong evidence in itself that the vessel was still.

He says that none of Larsen's soundings were reported to him prior to the collision.

Up to the time of changing his course, Lie admits he had but two compass bearings on the siren. Two compass bearings on an unknown siren were sufficient he says to tell him he was off Point Reyes, where he expected a steam whistle, and to tell him with such certainty that the vessel's course could be laid "straight" for the lightship (Dep. Ex. A. log) 22 miles distant.

Captain Lie's counsel claims much for the captain's excellent memory (1208). It should be noted that in this connection that the captain, when he went into the chart room about 2:55, after changing his course, compared his Point Reyes bearing with his Fort Point bearing (see last citation of evidence above). It must therefore have been fresh in his memory that Fort Point was at least 28 miles away in a direction 23 degrees to the east of his course to the lightship. All of this, he says, was completely verified after changing his course by his soundings and his log of distances run, as compared with his two siren bearings, and at 3 P. M., when they had returned to the bridge, by a third siren bearing.

We thus have him claiming to be completely informed as to his location and on a definite course at 3 P. M. He then tells us that he heard a whistle dead ahead (p. 221), that is to say from a direction south of the lightship (p. 221), to which he listened for *ten* minutes uncertain as to whether it was an approach-

ing ship *or foghorns off the Golden Gate,* at all times over 26 miles away, and 23 degrees to the easterly of dead ahead.

His testimony in this connection is as follows:

"Q. Did you know when you heard the first whistle that it was the whistle of a steamer?

A. No, sir, I did not at that time.

Q. What did you think it might have been, if not a steamer?

A. Well, at that time it just came into my mind that it might be one of the fog horns off Golden Gate."

Page 162.

"Q. You say you had discussed with the other officers, but you did not mention at that time to them the fact it might be this land whistle?

A. I did not mention that to the chief officer. I mentioned it to the third officer when we commenced to time it.

Q. When did you commence timing it?

A. That is at 3:05."

* * * * * * *

"Q. So you say that you thought at that time that might be a whistle coming from the Golden Gate *dead ahead under the course you were sailing?*

A. *I did not have in mind exactly where the Golden Gate was at that moment.* That just came to my mind because I didn't have the bearings of the Golden Gate in my mind. I was steering the course for the lightship."

Record, pages 219 and 220, and see supra.

The court will here note one of the many extraordinary inconsistencies which the fertile mind of the "Selja's" captain has woven into the testimony. Between 2:55 and 3:00 o'clock he is in the chart room

noting the bearings of Fort Point, the southern post of the Golden Gate itself, to check up his course in the lightship (supra and record, page 1201) while between 3:00 o'clock and 3:05 he thinks that a whistle coming from *south* of the lightship may be from the Golden Gate, 23 degrees and seven and a half miles (page 227) *northeasterly,* "because I did not have the bearing of the Golden Gate in my mind". Captain Lie's counsel is certainly correct when he tells us (record page 1208) that the captain's memory is the marvel of those who were compelled to sit throughout the long hearing before the commissioner.

The "Selja" story then is that she continued steaming on in the belief that the whistle might be from shore, from 3:00 o'clock till 3:10, at which latter time she had a speed of between 3 and 4 knots. Her engines were then stopped and it is claimed she went ahead on her own momentum till 3:15, when the "Beaver" appeared. At 3:16 the collision occurred at a point alleged to be about 2½ miles southeast of Point Reyes.

Such then is the story that the "Selja's" representatives ask the court to accept. It is full of inherent improbabilities. It certainly requires an extraordinary stretch of credulity to believe that Captain Lie thought he heard a siren at the Golden Gate through those 26 miles of dense fog, or that he changed his course to the lightship on two siren bearings which nothing but second sight could have told him were from the recently substituted signal at Point Reyes. We will later examine Captain Lie's testimony at length and show it to be

filled with contradictions manifestly made to serve immediate purpose, as he was pressed in cross-examination.

It will not surprise the court to find that the story of the "Selja" is contradicted by the testimony both of third parties and of the "Beaver's" crew, and by the admissions of the "Selja's" officers and her log. These clearly show:

a. That the "Selja" was lying at a standstill for some time prior to 3:15 and that she had not blown a two blast signal as required by Article 15 of the code.

b. That when first sighted by the "Beaver", instead of heading south 55 east, and hence diagonally across the westerly sea, the "Selja" was lying in the trough of the sea, headed about due south and at right angles to the course of the "Beaver".

c. That the collision took place about six miles southeast of Point Reyes at a point the "Selja" could not possibly have reached, if she had passed Point Reyes abeam at 2:50 p. m.

We will consider successively the evidence establishing these three propositions.

a. *The "Selja" had no way on her for some time prior to sighting the "Beaver" and gave the wrong signal, i. e., one blast instead of two blasts as required by Article 15.*

All the "Beaver's" witnesses agree that no two blast signals were heard from the "Selja" up to the time of the collision, and it is not contested by the representatives of the "Selja" at the trial that none were blown.

Captain Lie says that he lost his log at the sinking of his vessel and that he ordered his officers to prepare a log of the occurrences of the last day. This was done on the day succeeding the collision. It was read over to the officers by the captain and signed by him and the first and second officers (Depositions, Bjorn, p. 123, Anderson, p. 101). In it appears the following statement:

> "At 3 o'clock we heard a deep steam whistle ahead quite faint and from then on heard it about every minute; we answered with the same interval. At 3:05 P. M., ordered slow speed, as we heard the whistle nearing, and at 3:10 stopped the engines, the vessel *then* being *nearly at a standstill.*"
>
> Exhibit A to depositions.

This statement that she was "nearly at a standstill" at 3:10 is most significant, made as it was immediately after the disaster and before they had realized their error in failing to blow the two blast signal. If the "Selja" was *nearly* at a standstill at 3:10, five minutes before the "Beaver" came in sight, it is patent that she was actually at a standstill some time before 3:15, and that at least one, if not two, of the two blast signals should have been blown instead of the one blast signals actually given. Indeed Captain Lie admits that at 3:15 one two whistle signal "should have blown" (page 174).

Each officer was asked as to the correctness of the abstracts from the log, and each confirmed them under oath (Dep. 63, 70, 86, 101, 123). As a matter of fact they signed copies twice, once the day after the collision and once a week later (Halverson, page 63).

Captain Lie's explanation of how he came to read over the statement to his officers and sign it himself when, as he later claimed, he knew the vessel had over three and possibly as much as four knots speed, and hence could not have been nearly at a standstill at 3:10, displays his usual want of candor. He says:

> "Q. So that either one thing or the other is wrong; if the statement is in here that she was nearly at a standstill,—that is incorrect according to your statement, is it?
>
> A. It depends upon what you mean by nearly at a standstill; *it may be she was as nearly at a standstill as she could be by the vessel being stopped to 3 knots.*
>
> Q. Then if she stopped at 16 knots you would say the same thing, that she was stopped at 16 knots, but nearly at a standstill because she was as slow as she could be, stopping 16 knots? A. I did not say that. That is an extremity."
>
> Pages 1163-1164.

Under further pressure of cross-examination he abandons any attempt to reconcile the two statements and insists on his later position, saying (page 1164): "She was not at a standstill and did not appear at a standstill". He admits, however, that she was at a standstill by 3:15 and hence that he should have then blown a two blast signal.

Two days after signing the log, Captain Lie called on United States Inspector Bulger, in response to a request that he testify at the investigation of the conduct of the American officers in charge of the "Beaver". This was on the morning of the 25th of November. In talking over the collision with Inspector Bulger, Cap-

tain Lie stated *that he had been stopped* for ten minutes before the collision. Inspector Bulger's testimony is as follows:

"Q. Can you tell the conversation, Captain?

A. To the best of my recollection I will tell you just what happened; it is brief.

Q. That is what we want.

A. I spoke to the captain. I cannot tell you the exact words, but when we got to a point where *the captain told me that he had been stopped for ten minutes, I asked the captain if he was blowing his whistle; he said yes, that he was blowing a fog whistle.* At that point I said to the captain 'We don't wish to take any advantage of you, Captain, I think it would be advisable for you to have your attorney here to represent you'. The captain went away and returned in the afternoon with Mr. McClanahan, as his attorney.

* * * * * * *

"Mr. McCLANAHAN. Q. Did he say or did you understand clearly what he meant by the statement that the 'Selja' had been stopped about 10 minutes, Captain? Did you understand that he meant that the 'Selja' was dead in the water or that her engines had simply been stopped?

A. When I get it from the bridge that a ship is stopped I take it that she is stopped through the water. When I get it from the engine room I take it that her engines are stopped. I would think that when the captain said his ship was stopped that her headway was stopped."

Pages 947, 948.

In the afternoon Captain Lie returned with his attorney and changed his statement to a stopping of his *engines* for *five* minutes and a continued way on the ship till the "Beaver" came in sight instead of a stopping of the *"Selja"* herself for *ten* minutes. Mr

Bulger, who was a chief engineer before he became inspector, noticed the discrepancy at once, but waited to check it up with the "Selja's" engineer's testimony and his log.

To his astonishment Captain Lie's attorney refused to allow the chief engineer to be sworn, although he was waiting in the hall to be called. Mr. Bulger's attempt to have him put on the stand came after his asking the preceding witness a question about the time between the alleged stopping of the engines and the collision (page 993) so that Captain Lie's attorney could have no doubt about Mr. Bulger's purpose in calling the engineer. The testimony in this respect is as follows:

> "Inspector BULGER. We would like to have your chief engineer.
>
> Mr. MCCLANAHAN. I think we have given our statement sufficiently.
>
> Pages 993-994.
>
> Inspector BULGER. Have you any objection to putting anybody else on the stand?
>
> Mr. MCCLANAHAN. Yes, simply because it is not necessary to put them on the stand in this hearing.
>
> Inspector BULGER. I would like to know if his engine was stopped, according to the log?
>
> Mr. MCCLANAHAN. I prefer not to have any of the witnesses put on for the Norwegian ship.
>
> Inspector BULGER. We got part of it.
>
> Mr. MCCLANAHAN. You got all of it. Well, I have said my say, I don't propose to put on any more witnesses. They can give you no more light than you have; I examined them and I know.
>
> Inspector BULGER. According to that we are not competent, but we have been handling these cases

for over twenty years. We think the engineer is essential in this case.

Mr. McClanahan. You have the evidence."

Bulger, page 979.

The question then being investigated was, was the "Selja" at a standstill before 3:15 and hence at fault for not blowing two blasts of her whistle? Captain Bulger wanted to interrogate the "Selja's" engineer on this point. Captain Lie's attorney would not permit it because he said he knew what the engineer's testimony was, and that it would have been the same as the others. As the attorney put it——

"You got all of it. Well, I have had my say. I don't propose to put on any more witnesses. They can give you no more light than you have. I examined them and I know."

Page 979.

The counsel was evidently mistaken as to what his engineer would say, or at any rate, if he had "examined him" he did not "know" what "light" he would throw on the question. It appeared before a week had passed that they had not "got all of it" and that the engineer *could* give "more light" than they had. As a matter of fact, he testified in his deposition taken on December 2nd that the "Selja" must have been at a standstill by at the latest 3:13, two minutes before the "Beaver" hove in sight. The engineer, Eggen's testimony is as follows:

"Mr. Denman. Q. And at 3:10 the engine had stopped.

A. Yes.

Q. How long would it take her to stop her speed going at the rate she was going at 3:10? About a minute, isn't it?

A. Oh, it would take perhaps two minutes.

Q. Not more than two minutes?

A. Do you mean to stop herself?

Q. Yes.

A. Oh, a minute to two or three minutes.

Q. About a minute, isn't it really, chief?

A. No, well, it would take her two minutes, I should think.

Q. About two minutes?

A. Yes.

Q. That is at the outside?

A. Two or three minutes.

Q. Not more than three?

A. No.

Q. You are sure of that?

A. Yes."

Deposition Eggen, page 73.

Our opponent's comment on this is interesting. He says, in answer to a question:

"Q. He did testify to that within a week after the hearing, didn't he?

A. On your cross-examination he did, and you put the words into his mouth, yes. A poor foreigner, who didn't have very good command of English, and he was led up to the water and made to drink."

Page 995.

Counsel had for the moment forgotten that Eggen had given similar testimony before the Norwegian consulate (1342).

An examination of Mr. Eggen's deposition absolves him from any accusation of defective English. He really needs no such absolution, as it is proof positive

that the "poor foreigner" had been led into no error which could be remedied, that his able counsel did not attempt to correct his statement on redirect examination. The taking of the depositions was continued till the afternoon, but he was not recalled after the recess had given full opportunity to talk over the matter with him.

Still more significant than the failure to re-examine Eggen is the fact that *not one of the other officers was asked in his deposition as to whether the "Selja" had lost her headway before she began to reverse.* This was the glaring fault of which it had been intimated by Mr. Bulger that she had been guilty—that she had been at a standstill for some minutes and had not blown her two blast signal. Eggen had testified that she must have been and yet every officer, save the captain, was exhaustively examined by the libelant's counsel and not one asked whether she had come to a stop in the water, or any question concerning her headway in the two or three minutes before the "Beaver" came in sight.

Let it not be said, however, that our opponents have no testimony on this subject. They have much. While openly contemptuous of their chief engineer, who had been with the vessel since she was launched, and avoiding the evidence of the deck officers who saw and must have known the facts, libelant's counsel offer three expert ship building engineers, all without experience in navigation. These gentlemen have deduced certain stopping formulae from experiments made *at launchings.* At these launchings all the vessels are checked

and finally stopped within 1000 feet by means of hawsers and the resistance of the cradle on which they rest and which is launched with them (page 1114). Their speed varies in this short distance from over 13 knots an hour to nothing. From this they calculate that it would take the "Selja" 9 minutes and 52 seconds to stop (page 413). There is no difference between these three savants as to the seconds, but they disagree with the "Selja's" own captain as to something over four minutes, Captain Lie insisting that she was *just* stopped at 3:15, or in five minutes. The disagreement with the captain is of course of no significance, as he never has had any opportunity to time vessels as they slide down from their cradles (or with them) at launchings, and are checked in their speed by successive hawsers. It is a splendid demonstration of the accuracy of science that the engineers agree as to the seconds between the ninth and tenth minutes. Surely their formulae deduced from the launching pool must be infallible when applied to loaded vessels moving without check of either hawser or cradle in the open sea!

Before turning from the question of Inspector Bulger's testimony, it is but fair to our opponent to say that he now claims his reason for refusing to permit the engineer to testify was that Mr. Bulger's manner was so discourteous to Captain Lie that he would not allow any other witness to be subjected to it (page 977). Our opponent injected this into the record in response to a question from Mr. Bulger himself.

Mr. Bulger. A. Just let me ask you a question: was there any discourtesy shown to Captain Lie when he was on the stand in my office?

Q. You want me to answer that perfectly frankly, Captain?

A. Yes, I do.

Q. I believe, Captain Bulger, that you were very discourteous to Captain Lie.

A. In what way?

Q. Just wait a moment: you have asked me a question and I am going to answer it. *And that was the reason why I refused to allow any more of the 'Selja's' officers to be examined.''*

Page 977.

Our opponent is, however, again mistaken when he says ''he refused to allow any more of the 'Selja's' officers to be examined''. He finally remembered under examination the next day, that Captain Lie's examination had been finished and the discourtesy well over, when he did allow the second officer to be examined. He further stated that he could not recollect that any discourtesy had been offered to the second officer, but that the discourtesy to the captain did not fully dawn upon him till the end of the second officer's testimony. It will be noted that it was at the end of the second officer's testimony that the engineer was called for, avowedly to ask him about the stopping of the ship. Our opponent assures us, however, that this had nothing to do with his refusal to let him testify.

The apparent discourtesy to Captain Lie, if it really existed, is easily enough explained. It would have been quite a human thing to expect that Inspector Bulger, remembering Lie's statement in the morning that his

vessel had been stopped for ten minutes, should have pressed him severely when in the afternoon, after consulting counsel, he swore she had not been stopped at all. This is said without any reflection on counsel, as Captain Lie was an exceedingly keen person and would have only to know the law to make certain of his testimony.

Our opponent's proctor did his best to shake Mr. Bulger on cross-examination. On failing to do so he suggested that Mr. Bulger was within the reach of influence because *he was a federal office holder* (page 981). We called on him to explain or retract this statement but he has not done either. We now look to his brief for the one or the other.

Lie denies that this interview or anything like it ever took place (Record, page 1253), so there can be no question of mistake as to the words spoken. It is a square issue of veracity between the United States Inspector and Captain Lie. In such an issue, Lie cannot hope to prevail in view of the contradictions and purposeful shiftings which appear in his evidence on every important point.

In addition to the testimony of Captain Bulger, there are three other witnesses to the admission of Captain Lie that the "Selja" had been still in the water for some minutes before the collision.

The "Selja" was under charter to the Portland and Asiatic Steamship Company and Captain Lie and Mr. Eggen, the engineer, reported to Mr. Frey, the assist-

ant to the president. Mr. Frey kept memoranda of both interviews.

Captain Lie told Mr. Frey that the engines of the "Selja" were stopped at about 3:05, or ten minutes before the collision (page 698). Mr. Frey understood from the interview that the "Selja" had been dead in the water for five or six minutes (page 723).

Mr. Eggen's statement as made to Mr. Frey corroborates his deposition as to the time when the vessel came to a standstill.

> "He stated that the engines were stopped prior to the collision for fully five minutes before the full speed astern signal had been given, immediately prior to the collision. That, as the ship had been going under 20 revolutions prior to the engines being stopped, the ship should come to a dead stop in the water under these conditions within one or one and a half minutes, and that he was satisfied the ship had been dead in the water at least three minutes, or slightly more, prior to the time that the astern order was given."
>
> Page 700.

Mr. Frey is at once an officer in the Portland and Asiatic Steamship Company, which is libeling the "Beaver" and of the San Francisco-Portland Steamship Company, which owns her. The latter company has no financial interest in the outcome, as it was 100 per cent insured (page 724).

After the collision, Captain Lie was brought on board the "Beaver" and when he had been given dry clothes, he came up on the bridge and had an interview with her officers. This was just after the vessel

had gotten under way on her return to San Francisco, and within an hour of the collision. The conversation was heard by Captain Kidston, second officer Ettershank and third officer Judson.

Captain Lie then claimed that his vessel had been still in the water for ten minutes. He was excited, as one might expect of a man who had just lost his vessel and had had, in addition, an unwelcome plunge into the North Pacific, on a November afternoon. No doubt his motive was to show that his vessel being dead in the water could not have possibly been at fault—not realizing the error as to the one blast signals. It is quite possible that the ten minutes claimed was an exaggeration born of a desire to make certain that his vessel could have furnished none of the impetus which brought the two together. Captain Kidston described the interview as follows:

> "Q. After the collision did you have any conversation with Captain Lie on the bridge of the 'Beaver'? A. Yes, sir.
>
> Q. Whereabouts did that conversation take place?
>
> A. On the bridge of the 'Beaver'.
>
> Q. Who was present? A. The second and third officers.
>
> Q. State the conversation, as near as you can recollect it, what you said and what he said.
>
> A. When Captain Lie came upon the bridge, he came up on the starboard side, and I met him at the top of the ladder and, being previously acquainted with the captain, I knew him before, I shook hands with him and expressed my feelings as regards being sorry that the accident occurred. I also inquired if he had any dry clothes and he said yes, although he was shivering; that was

natural, the man had been overboard and was wet and was shivering; I didn't quite believe he had changed all his clothes and I felt his breast to see if he had dry clothes on. While I was doing that he made the remark that he had heard my whistle for 15 minutes and he knew it was either the 'Beaver' or the 'Bear' by the sound of the whistle and——

Q. (Intg.). Did he say why he knew it? A. No, he did it. We met him in Portland and I presume he heard our whistle there. That is the remark he made, that he knew it was either the 'Beaver' or 'Bear' by the sound of the whistle, and *that he had been lying at a standstill for over 10 minutes in the trough of the sea,* and that he had taken a sounding.

Q. Did he tell you what the sounding was?

A. Yes, he said 35 fathoms.

Q. Where did you go with the Captain?

A. After the mate came on the bridge, after the first officer came on the bridge, I took him down to my room to give some heavier clothing.

Q. Did you have any conversation with him after you went below?

A. Oh, yes, we were talking after we went down in my room.

Q. Was there further conversation on the bridge also?

A. Yes, there was further conversation on the bridge, not much though.

Q. What else did you talk about there?

A. He told me on the bridge that he had been up from 2 o'clock in the morning, that he made the land or got his soundings at 2 o'clock in the morning, and he had not got any sleep practically all night, and he had had a fog. That was some of the conversation. That is about all the conversation that I recollect up there. Down in the room he also talked about the collision. I told him he should be thankful for one thing, that his wife and

two babies had been saved and that there was no loss of life to amount to anything."

Pages 814, 815.

Lie and Kidston were old acquaintances and Kidston tells why he did not then accuse Lie of fault.

"Q. I do not remember that you referred to this fault of Captain Lie's, when he stated it to you? A. No, sir.

Q. Why not? A. Well, Captain Lie had just lost his ship, Mr. McClanahan, and he was feeling pretty bad and pretty nervous over it; I knew that it was a great fault and I didn't wish to make him feel any worse than he was, and rub it in on him at all. That is one reason why I did not refer to it."

Page 835.

"A. The volunteer statement that Captain Lie made at that time did impress me as extraordinary, but I accounted for it in this way: he was very much excited, the man had been overboard, he just lost his ship, and after I had sympathized with him for the loss of his ship, I was sorry that it occurred, it impressed me as though he was trying to tell me that it was not his fault—the collision was not—in other words, I figured that he was trying to impress me that it was my fault, and to do so he told me that *he had been lying dead still in the water for over 10 minutes* and had heard my whistle. That is the impression it gave me at the time."

Pages 940-941.

Counsel for the libelant has sought to discredit Captain Kidston's testimony as to this conversation on the ground that he did not incorporate it in his report

to the United States Inspectors nor refer to it at the hearing. His explanation is that he felt that his own conduct was alone in question, that Captain Lie was not on trial, and that it did not seem to him necessary to interject this element into the hearing. That he was wise in his judgment as to the conduct of his case is apparent from the decision of the United States inspectors, for they exonerated him (page 836).

However, Captain Kidston's testimony as to the conversation is fully corroborated by two of the "Beaver's" officers who were on the bridge at the time; third officer Judson, who left the employ of the company in February after the collision (page 479), and second officer Ettershank. Their testimony is substantially the same as Captain Kidston's differing only in their remembrance of the phraseology used by the Norwegian captain. It is as follows:

> "Mr. DENMAN. What else occurred in that conversation? Give us the whole conversation, just what happened.
>
> Mr. JUDSON. A. Well, the captain came on the bridge. Captain Kidston said, 'I see you have dry clothes on'. He said, 'Yes, I have dry clothes on', and the captain told him he was very sorry he sunk his ship. And that is the time that Captain Lie said that he had been at a *standstill there for over 10 minutes* taking soundings.
>
> Q. Did he say what sounding he had taken?
>
> A. 35 fathoms.
>
> Q. 35 fathoms? A. Yes."
>
> Judson, page 476.

> "Q. What, if anything, was said in that conversation? Mr. ETTERSHANK. A. Well, there was

some words that was said. The captain took hold of him and said 'You have got dry clothes on', and Captain Lie says, 'Yes, I am all right'. Captain Kidston then says, 'Well, I am sorry that I sunk your ship.'

Q. What followed in that conversation, if anything, on Captain Lie's part? A. He said he was laying dead still, he said, taking soundings; he says he knew it was the—he says 'I heard your whistle for somewhere around, about 15 minutes', he says, 'before you hit us'; he says 'I knew it was the "Bear" or the "Beaver" by the whistle'.

Q. Was anything said as to the length of time he had been lying there?

A. He said he had been *stopped there for ten minutes."*

Ettershank, 510.

The cross-examination of the witnesses seemed to indicate that libelant's counsel found some difficulty in reconciling their statements because they do not report Captain Lie's words *ipsissimis verbis.* They variously attribute to him the statement that the "Selja" for a period of ten minutes before the collision was "dead still" (pages 510, 940), "stopped there" (510) "at a standstill" (476), "lying dead in the water" (libelant's Ex. 29). We respectfully submit that nothing would have been more suspicious than unanimity of statement among these three witnesses who were testifying nearly eight months after the occurrence.

Captain Lie denies that he made this statement on the bridge, and denies that he ever used the word "standstill" as describing a boat which had stopped in the water, and says that he regarded the term as more properly applied to a horse. The word comes easily

to his lips, however, in his answers to questions on pages 253, 1161, 1162, 1163, 1164, 1165, 1166. It is the phrase almost universally used by such admiralty jurists as Justices Brown and Clifford and appears throughout the decisions.

It is most significant also that on the very day that Captain Kidston testified, and before Captain Lie had made his denial, he, Lie, walked with Captain Kidston from the court room and up the street before all the counsel in the case, engaged in a friendly conversation *about the cost of living in San Francisco* (Kidston, 1388, Lie, 1277). Surely if the account Captain Kidston had just given—an account which put Lie entirely in the wrong as to the cause of the collision and convicted him of grave fault—was perjured, he would not meet the perjurer as he came from the stand and walk out of the court room and up the street together engaged in a friendly conversation before all the persons who had been following the testimony.

In considering the evidence establishing this fault, we must bear in mind that it must be proved in the main from the mouths of our adversaries. Their movement, or want of movement, was cloaked by the fog. It is submitted that the evidence of the admissions of the "Selja's" captain, her engineer Eggen, her log, and the actions of her counsel, is convincing. To summarize; the log signed by all the officers shows that the "Selja" was "nearly at a standstill" five minutes before the "Beaver" was seen; the chief engineer says in his deposition she must have been at a standstill

at least by 3:13, two minutes before the "Beaver" appeared. He makes the same statement in his report to Mr. Frey. Captain Lie told United States Inspector Bulger that the "Selja" had been stopped for ten minutes. His statement on the stand before the United States inspector differs from this, and when Mr. Bulger wants to call the chief engineer to determine whether the "Selja" had in fact stopped, Captain Lie's counsel, who had been apprised of the fault in failing to blow the two blast signal, when not under way, refuses to put him on the stand. His assigned reason for not producing Eggen is that he had examined him and knew he would corroborate Captain Lie, but when his deposition is taken a week later, Eggen testified that the vessel must have been dead for at least two, if not three minutes. Captain Lie's counsel at the taking of the deposition fails to ask any other officer whether the vessel was at a standstill before 3:15 or to cross-examine the engineer. Captain Lie tells Captain Kidston when upon the bridge of the "Beaver" just after the collision, in the presence of officers Judson and Ettershank, who remember the circumstances, that he had been dead still in the water for over ten minutes. He is apparently desirous of proving that his motionless ship could not have contributed to the collision, but he fails to realize his fault in not blowing the two whistles. Besides this, he tells a similar story to Mr. Frey, to whom he reports as the agent of the charterer.

It is submitted either that Captain Lie must be taken to have admitted his fault, or that he has been en-

meshed by a conspiracy so complicated in its ramifications that its iniquity seems beyond belief.

However, we are not compelled to rely on this testimony and admissions alone, for the position of the "Selja" with reference to the swell when the "Beaver" first saw her not only further contradicts Captain Lie's account but lends strong support to the theory that the "Selja" had been at a standstill for some time.

B. *When first sighted by the "Beaver", instead of heading south 55 east, and hence diagonally across the westerly sea, the "Selja" was lying in the trough of the sea, headed about due south and at right angles to the course of the "Beaver".*

In order to properly picture the movements of the two vessels in the fog, it must always be carried in mind that there was a heavy swell from the west, unbroken by wind. Its crest and trough were hence at right angles to its line of movement and lay in a northerly and southerly direction.

The witnesses on both sides (save always Captain Lie and two Danish fishermen procured by him) are agreed as to the intensity of the swell. The first officer of the "Selja" says that one of the boats was smashed alongside the ship (Halvorsen dep., p. 57). It was a "heavy" westerly swell (Larsen dep., p. 78); a "high" westerly swell (Halvorsen, page 1343). The officers of the "Beaver" agree with this, Captain Kidston says, "a heavy swell" (798). Third Officer Judson says "a heavy swell" (478). He had never seen the bar

breaking as it was on their return without a wind (page 478). Second Officer Ettershank says "heavy westerly swell, ground swell running" (page 504).

Three pilots who had been out all the day of the collision till one o'clock, also testify that they remember the day because they had been waiting for the Japanese fleet. Captain Swanson brought in the "Arizona" just before the "Beaver" left the gate. She was a vessel of 12,000 tons capacity, belonging to the American-Hawaiian Steamship Company. Swanson describes the condition as follows:

> "Mr. DENMAN. Q. What was the condition of the weather that night, Captain? A. The weather was foggy during the night before, it was foggy most of the night, and a very heavy swell; it was an extraordinary swell.
>
> Q. How long did that swell continue?
>
> A. It continued—I came through the north channel at one o'clock that day, and, of course, I could not tell after that. The condition coming through the north channel was as heavy a swell as I ever came through there in.
>
> Q. Was that on the 22nd? A. That was on the 22nd.
>
> Q. What vessel did you bring in? A. The 'Arizona'.
>
> Q. Anything happen to her? A. Well, she carried away her light screens, that is, the screens on the side. All obstructions that were on the side—the accommodation ladder was split all to small pieces, and also it filled all the state-rooms and there was a kind of a general upheaval all around.
>
> Q. Where did this occur? A. Right in the north channel.
>
> Q. What caused this? A. There was an extraordinary heavy break on the bar."
>
> Page 1285.

Had there been any mistake in the day testified to by the pilots, the records of the Custom House would have shown it. Had there been any mistake as to the damage done, our opponents would have shown it from the offices of the American-Hawaiian Steamship Company in San Francisco, the home port.

Pilot Von Helms had been going in and out of the port as a master and pilot since 1868. He attempted to take the "Nippon Maru" out over the bar at about 4 o'clock in the afternoon an hour after the collision. He was unable to do so that evening and had to anchor outside the heads off the Cliff House all night.

Pages 1348-1349.

All this is mere human testimony. Its unanimity coming from persons both of opposing interest and indifferent to the cause, is most significant. It is, however, borne out by the record of a mute mechanical device that sets at rest all questions as to the extraordinary conditions on that day.

The United States Coast and Geodetic Survey has maintained for more than 50 years (page 1314) an instrument called a maregraph just inside the Golden Gate in the bay of San Francisco which records the pulsations of the swell coming in from the ocean. The record of the 21st and 22nd of November was so remarkable that it was made a subject of a monograph by Alexander McAdie, chief of the United States Weather Bureau for the Pacific Coast (page 1311; see also 1319). Captain Westdahl of the bureau thought the extraordinary height of the swell on these two days,

as shown by the maregraph record, had been caused by an earthquake and started an extensive investigation through the Geodetic Survey stations (page 1319). It was finally shown to have been a sudden windstorm passing over Central California on November 21, moving westerly and causing a disturbance at sea which sent back the unusually heavy swell of that and the next day.

See full testimony of McAdie, pages 1309 et seq., and Captain Westdahl, pages 1319 to 1333.

A blueprint of the maregraph for these two days was put in evidence (claimant's exhibit, McAdie 1). It shows that the time of the greatest disturbance was between three and five o'clock on the day of the collision. The intensity was equal to that shown by the records of the heavy storm of midwinter (Westdahl, page 1321), thus corroborating pilot Swanson's statement (pages 1286-7).

All this becomes more pertinent in connection with our next chapter on the place of collision. We introduce it here though for two purposes; first as showing the hopeless struggle of Captain Lie, both through his own testimony, and of the two fishermen, to show that there was nothing unusual in the condition of the sea that afternoon, nothing that would in the slightest way affect the speed of a 3000 ton steamer of the type of the "Beaver". The second and main purpose is to show that beyond all question there was a very heavy swell from the west, with no wind to break its crest, which of necessity with its trough would lie north and south.

The next salient point is that the "Beaver" was steaming on her usual bi-weekly trip to Portland, on her invariable course of N. 86 west from Duxbury Reef to Point Reyes. North 86 west is only four degrees (less than half a point) from due west, so that the "Beaver's" regular course took her practically at *right angles to the swell.*

It is unquestioned that the "Beaver" made but one change in her course just after she heard the "Selja's" first whistle and before she began to reverse half a point (5½ degrees) to her port, or southerly, thus bringing her but 1½ degrees south of due west (pages 799, 800), for all intents and purposes at dead right angles to the oncoming swell. She had just steadied after this half point (pages 599, 799) when she heard the "Selja's" second signal blast, and believing she had way on her, began to reverse full speed. This sent her head to starboard as she continued under a rapidly diminishing speed so that she must have been pointing just a shade north of due west and in a perpendicular line to the oncoming swell when she was sighted by the "Selja". Captain Lie admits that he accepts the description of Captain Kidston as to his course as the basis of his chart, the libelant's exhibit 1 (pages 177, 1147, 1206). There is no question raised as to any of these movements save as to the starboard swing of the "Beaver" while reversing, in which Captain Lie, as not infrequently in the record, contradicts himself.

The position of the "Beaver" with reference to the oncoming westerly swell being thus fixed as at right

angles or slightly to the north of it, is a most important factor in the case. While the various witnesses to the collision naturally enough spent no time looking at the compass, they all did watch the opposing vessel. What they say as to the angle of the vessels to each other when they first came in sight and as they approached is then to be considered in the light of a known quantity as to one of them—i. e., that the "Beaver" was at right angles to the oncoming swell.

There are eleven witnesses, aside from Captain Lie, who testified as to the angle at which the two vessels approached *one another.* Six of these are from the "Selja". *All are agreed that the vessels, when they first saw one another, were at right angles*—that is that the "Selja" must necessarily be lying about north and south in the trough of the sea. Seven of the witnesses say in so many words that she was lying in the trough of the sea when the "Beaver" sighted her.

At the investigation before the Norwegian consul (where we had no right to put questions) the "Selja's" officers testified as follows:

> "Q. Give a statement, if you can, as to how it occurred, and the matters that preceded and followed it. A. I was on deck when I heard three whistles, which called my attention to look around. I thought of some danger somewhere around in the neighborhood; just a little while afterwards, a few seconds, I saw the dark mass of the 'Beaver'—which proved to be the 'Beaver' afterwards—just a little after, a minute or so, the 'Beaver' struck us. *She came in the direction something like a right angle on our ship as she was laying there.*

In a minute or so she struck us. It was a dense fog then."

First Officer Halvorsen, page 1343.

"Q. How, or what course, did she appear to be heading, and at what rate of speed did she appear to come? A. I would say that when she struck my vessel, she had about ten knots, and her course was then *at right angles to our ship,* but I did not look at my compass to see what she was heading; you see, she swung some, but I should say she was steering somewhere about west by—oh, I can't say, but I should judge it was crossing our bow somewhere about a point or two points."

Captain Lie, pages 1340-1341.

"Q. Please state how the collision occurred. Were you on deck? A. Yes, sir, I was aft in the poop with the sounding machine.

Q. Will you state how the collision occurred, insofar as you can do so? A. Yes. I had my work, I did not pay any attention to it, but I heard a whistle at 3 o'clock on the port bow, and about quarter past three I saw the steamer on the port side of us.

Q. She was coming toward you? A. Yes, sir.

Q. *At right angles to your course?* A. *Yes,* about that."

Second Officer Larsen, page 1344.

Engineer Eggen says, at page 27 of the depositions,

"Q. She was coming to your side? A. Yes.

Q. When you first saw her; that is true? A. Yes.

Q. And pretty well around toward the side so that the angle was pretty *nearly a right angle?*

A. *Yes,* a little on the foreside, a little forward of amidships."

Page 75.

First Assistant Anderson says:

"Mr. Denman. Q. You did not stay very long by the ship's side before you went down below, did you? You were just there for half a second, were you not? A. Just a moment.

Q. Just a moment? A. Just to look over and look into the water and at the same time run down.

Q. You saw the other vessel and you heard your full speed astern signal given, didn't you, at about the same time?

A. Almost at the same time.

Q. The other vessel was coming on you at *about right angles,* was she not? A. It appeared to me.

Q. At just about right angles? A. Yes, sir.

Q. Then you immediately went below? A. Yes, immediately."

Page 100.

"Q. You say she went astern about a minute after she struck, a little less than a minute, and about two minutes before?

A. Well, the engine worked altogether about three minutes astern.

Q. About three minutes astern? A. Yes, sir.

Q. That would make it about two minutes before? A. But I could not say exactly.

Q. Well, just about, that proportion? A. About that, yes, sir."

Pages 102-103.

Bjorn, the second mate, says:

"Q. Now, as I understand it, at 3:15 you saw the 'Beaver' coming on you *at about right angles* and you say she seemed to have speed on at that time? A. Yes.

Q. And *she continued* and *finally* struck you at about right angles somewhere about 70 feet aft the bow. A. 70 feet aft the bow?

Q. Yes. A. Yes, something around there.
Q. Somewhere around there? A. Yes, sir."

Page 122.

All the above is from the officers of the "Selja". The following five witnesses from the "Beaver" testified similarly as to the angle between the vessels when they sighted one another. Each says that the "Selja" *was then lying in the trough of the sea.* Lookout Amor, testifies as follows:

"Q. Where was she lying when you first saw her, whereabouts, with reference to the sea?

A. She was laying in the trough of the sea; we was coming head on to it.

Q. And at what angle would that be to your ship? A. Well, she was like that and we come about like that (illustrating).

Q. At right angles to you? A. I don't know whether you would call it right angles.

Q. Was she square on? A. Yes, right square on; her nose was coming towards our bow like that (illustrating).

Q. Would you say she was crossing your bow then? A. That is what she would have done if she had had any way; I guess she did not have any way at all.

Q. Could you tell whether she had any way on at all? A. It didn't look like it. Maybe if she had had any way we would have cleared the ship all right; we was swinging to starboard, we got our helm hard-a-port.

Q. When you hit her what angle did you hit her at? A. Well, she was laying straight across our bow, lying straight across; we struck her right broadside on, you might call it.

Q. Do you mean hit her squarely or at an angle? A. We hit her square on, sir.

Q. How was the 'Selja' pointing at the time you hit her? A. She was heading offshore, sir.

Q. I mean with reference to the ocean. When you saw her first she was lying in the trough of the sea? A. Yes.

Q. How was she heading when you finally hit her? A. Well, she was hardly in the trough,— I don't know, she looked to me she was kind of slewing.

Q. That is to say, her bow had turned into the sea? A. Her bow was turning to starboard; that is the way she seemed to me to be."

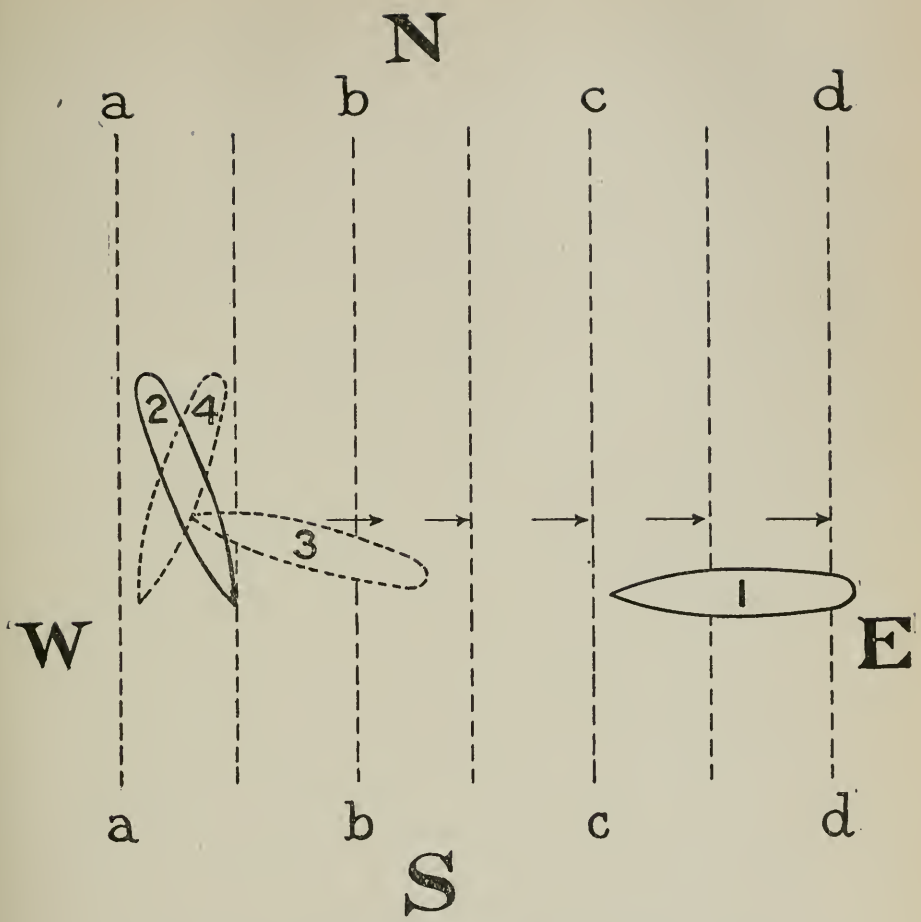
Pages 578-579.

The same testimony is given by the following: Captain Kidston, page 80, Second Officer Ettershank, 508, Quartermaster Hanson, 578, Engineer Paul, page 603, and Wireless Operator Broadus, page 1108.

Both vessels were reversing for about a minute. Both had right handed propellers, and both swung to starboard under the reversing engines (Lie, page 178, Judson, page 477, Kidston, page 801, Amor, page 579, Ettershank, page 508).

The result of the reversing and turning to starboard was that both vessels retained about the same relative position to each other, the "Selja's" bow having turned westerly from the trough and somewhat into the sea at the moment of collision, and the "Beaver" somewhat to the northerly, striking her at right angles (Kidston, pages 802, 826, Seike, page 670, Hanson, page 596, Paul, page 665, 666).

The following chart shows the line of the crest and troughs of the swells and the positions of the two vessels from 3:15 to the time of the collision:



a-a; b-b; c-c; d-d—lines of crests and troughs of seas as they move from west to east.

1. "Beaver" at 3:15, sailing westerly at right angles to line of swell, hears single blast from "Selja", indicating she is under way. Fearing "Selja" is crossing her bow, "Beaver" reverses.

2. "Selja" at 3:15 dead in the water, at right angles to "Beaver" in trough of sea, and pointing southerly.

3. "Beaver" at 3:16, after having swung 3 or 4 points to starboard under port helm and reversing propeller, collides with "Selja" at right angles.

4. "Selja" at 3:16, after having swung to starboard with reversing propeller and turned her head from the trough toward the swell.

All this is absolutely inconsistent with Captain Lie's story that the vessel had way on her from her S. 65 east course just up to 3:15. She must have been dead in the water for a considerable period to have fallen from her course of south 65 east to her position in the trough of the sea, where she was lying at right angles to the "Beaver" and pointing north and south with the line of the trough.

Captain Lie's statements with reference to the position of his ship show the same inconsistencies as his explanation regarding her way. When before the United States Inspectors he said that the "Selja" had swung but a *quarter of a point* (less than 3 degrees) from his course before the "Beaver" *struck* her (pages 305 and 1218). If this be true, then his course must have been about due south for the "Beaver" struck her when her head had just turned westerly from the trough toward the swell. Later Lie says that he had dropped a point (eleven degrees) from S. 65 to S. 54 east, when the vessels *came in sight.* But this would make his angle to the "Beaver" around 32 degrees (Record, pages 176-177), whereas all his officers, as well as the "Beaver's", testify that they were at about right angles when they sighted one another.

When Captain Lie testified at the Norwegian Consulate, three days after the collision, he said that the "Beaver" was crossing his bows (page 1340). Seven months later, when the theory had been developed that he would not be in fault if he were backing away from the other vessel*, he saw that if the "Beaver"

* Following the misleading dictum in the case of the St. Louis, discussed supra.

was crossing his bows and the "Selja" was backing there could have been no collision. His testimony then changes to a claim that when first sighted, instead of crossing the "Selja's" bows, the "Beaver" was pointed "somewhere about our midships" (page 1205).

Before the Norwegian consul Captain Lie said that the "Beaver" had swung to some extent from her course while he was watching her up to the time she struck. The record before the consul shows the following:

> "Q. How, or what course, did she appear to be heading, and at what rate of speed did she appear to come? A. I would say that when she struck my vessel she had about ten knots, and her course was then at right angles to our ship, but I did not look at my compass to see what she was heading; *you see she swung some,* but I should say she was steering somewhere about west by—oh, I can't say, but I should judge it was crossing our bow somewhere about a point or two points."
>
> Pages 1340-1341; 306-307.

This swinging of the "Beaver" under her reversing propeller throwing her head to starboard and towards the "Selja", necessitates the latter's being still more to the southerly off her S. 65 east course, to account for the vessels striking at right angles (see last diagram). We find Lie at the trial changing his testimony again and insisting that the "Beaver" did not swing, but kept her original course (pages 306, 177).

Lie's proctor made strenuous endeavor to show through his three experts that the "Beaver" would not swing to starboard under the manoeuvres after the

"Selja's" whistles had been heard. These men are consulting and constructing engineers. None have had any experience in navigation. At first they all testified that the "Beaver" would not swing to starboard. We offered to let them take the vessel and make the experiment (page 1305) and they then discovered that they had left out of consideration one element in the "Beaver's" movements. It was then found that she would be swinging to starboard and that there was no reason to contradict the statement of Captain Kidston and the "Beaver's" officers and crew that she would turn a considerable number of points between the order to reverse and the collision (page 1363).

In closing this portion of the argument, we submit that the testimony as to the relative positions of the two vessels when coming in sight of each other and at the moment of impact, shows that the "Selja" was lying in the trough of the sea and completely sustains the testimony that she had been for some minutes prior to the collision without way on her.

C. *That the collision took place about six miles southeast of Point Reyes at a point the "Selja" could not possibly have reached if she had passed Point Reyes abeam at 2:50 P. M.*

Captain Lie's theory places the collision 2½ miles south southeast of Point Reyes. He claims to rely on the three bearings from the Point Reyes siren and on his soundings to make this determination. We will show that his soundings are absolutely inconsistent with

his alleged bearings and that his calculations are hopelessly in conflict.

In contradistinction from these guesses in the fog, we have the direct testimony of the "Beaver's" captain and her first and second officers that the collision took place at a point around six miles southeast from Point Reyes light, determined by taking the bearings across his compass after the fog had lifted (Kidston, page 818). Laid on the chart these bearings show the collision to have been a distance of about 4¾ knots to the south end of Point Reyes, and a little over six miles to the lighthouse.

First Officer Seike says he feared the fog might shut down again and, not knowing the amount of injury to his own vessel, that he might have to take to the boats (page 671). He took particular observation of Point Reyes and located the "Beaver" as 6 miles southeast of the point (pages 673, 671). Ettershank, the second officer, confirms this as to general direction and distance, though he did not take bearings (page 511). Amor also saw the land (page 591), as also did Captain Lie, just as he came on board the "Beaver" when Captain Kidston pointed it out to him (page 1266).

This point is just over 18 miles on the courses sailed by the "Beaver" from the red buoy at the north end of the north channel through the bar at San Francisco. The log was set at zero at the red buoy and registered 19.6 knots when taken in at the collision (pages 514, 575, 812). The heavy head swell, in which the log moves with an up and down motion while the vessel cuts through in a much more direct line, causes the log to

travel considerably farther than the vessel. In the language of the sea the log *"overruns"* the ship in going into a head swell. In this heavy swell the first officer tells us the log would have overrun the vessel from three-quarters of a mile to a mile an hour (page 685). In the hour and a half run from the red buoy the log would thus be expected to show a run of about 19½ miles for the run over a measured distance of 18 miles.

This phenomenon of the overrunning of the log when heading into a swell is confirmed by the testimony of Captain (now Commodore) Lopez of the U. S. Navy, of over thirty years' experience, including details in the Coast and Geodetic Survey and Lighthouse Inspection. He says that it is a well known fact (page 747) and that the reverse is true, i. e., that the log underruns the actual distance when running before the swell, causing the log to "set home" (page 779). The overrun shown by the log in this case did not seem to him excessive (pages 772-773).

Captain Kidston's testimony is similar; every log he had ever had experience with would overrun in a head sea (page 816).

The 19½ miles shown by the log then confirms the captain's statement that the collision occurred at a place about 6 miles southeast of Point Reyes and something over 18 miles from the red buoy. It is entirely inconsistent with Captain Lie's statement that it occurred at a point 2½ miles south southeast from Point Reyes and over 22 miles from the red buoy. Under

no possible theory could the log have "underrun" in going into the head swell.

Another fact confirmatory of the testimony of the "Beaver's" officers as to the place of collision, is the number of revolutions made between Duxbury Reef and the place of collision. The testimony is that she was making 77 revolutions (Paul, page 606, Townsend, 1356) which would give her a speed of 15 knots in smooth water. This place would have just brought her to the place of collision claimed by Captain Lie *if there had been no heavy head swell at all to retard her course.*

We have before pointed out the testimony of Captain Westdahl of the Coast and Geodetic Survey, and of Mr. McAdie, of the Weather Bureau, of the Bar Pilots, as to the extraordinary swell prevailing on this day. The maregram showed that it was equal to the severest storms of midwinter (Westdahl, page 1321, McAdie, pages 1310 and 1311).

The action of the head swell has a heavy deterrent effect on the speed of a steamer in three ways: first, in exposing her propeller (racing) and hence diminishing her power; second in the retarding action of the oncoming waves as they strike her; and third, in causing her to pitch (page 1357) and thus travel through the water in a series of long low vertical curves, thus increasing her distance travelled.

The top of the propeller of the "Beaver" as she was laden on this day was just awash (Kidston, 816) and hence every wave would expose it to a certain extent. The huge swells in fact did expose her so that her fre-

quent racing was noticed by both the engineers (Townsend, page 1357, Paul, 605-606).

Captain Westdahl of the Coast and Geodetic Survey, who has been a Master since 1864, and commanded the Gedney, McArthur and Pathfinder, all federal vessels, was asked as to the retarding effect of such a heavy swell as that shown by the maregram on a vessel steaming into it at a 15 knot pace. He says that it would be entirely reasonable to expect that her speed would be cut down 3 knots.

Westdahl, pages 1319-1331.

Commodore Lopez says that the combined effect of a heavy swell in exposing the "Beaver's" wheel and retarding her as she drove into it, would quite likely amount to 3 knots in what would be a 15 knot pace for smooth water.

Lopez, page 745.

Kidston says that from his experience with his vessel he knew she was cut down to at least 12 knots in her last hour's run (page 804). He is confirmed by Mr. Paul, his chief engineer (page 606), and the other officers.

Under these conditions it was absolutely impossible that the "Beaver", which left Duxbury Reef at 2:15, should have travelled 15 miles to Captain Lie's alleged point of the collision in the hour up to the time they came together. On the other hand, with the reduction that the disinterested witnesses and the "Beaver's" officers both expected, the vessel would have travelled to the neighborhood of the point found by Captain Kidston when he took his bearings on Point Reyes.

On the return voyage from the wreck, the "Beaver" took a course for the lightship, fearing to come in by the north channel. She steered south 71 east by her compass, which had a four degree variation to the easterly, that is to say, south 67 east through the water (Seike, page 672, Kidston, 807, Ettershank, 513). Sailing on this course without an alteration they picked up the lightship dead ahead (page 672). A line drawn S. 67 east through the lightship passes near the place of collision as claimed by the officers of the "Beaver" while it is considerably to the east of the place claimed by Captain Lie (see exhibit 1).

We thus see that every important fact connected with the movements of the "Beaver" sustains the testimony of her captain as to the location of the place of collision, and contradicts the contention of Captain Lie. When we come to examine Captain Lie's testimony as to his movements and calculations, we find it is filled with irreconcilable facts and statements.

The log Lie signed says the collision occurred while sailing on a course S. 65 east "*straight* for the lightship" (deposition Exhibit 1). On his cross-examination he said this course might take him an eighth or a quarter of a mile south of the lightship (218). He was finally forced to confess that it would take him *a mile and a half to the southerly* of the lightship (81), an absurd course for a man seeking to come into the port of San Francisco from off Point Reyes.

When we come to examine his chart, we venture to say that never before in the history of navigation has

a more remarkable series of coincidences combined to enable a captain to locate, almost to a foot, his position in a fog, off a coast he has just crossed thousands of miles of water to reach.

Just at the hour of 2:30 o'clock, the sound of a siren is heard. Note the time, 2:30, the even half hour, the ideal point for beginning the calculations which are to end at 3:15. Note also that it was not a case of waiting till 2:30 to see what could be heard, but that the first sound came out of the fog to the ship at just this fortunate moment.

The direction of the sound over the compass is *exactly* east by north. Note the nice exactitude of the point of the compass—no puzzling degrees or fractions of a point to complicate our calculations.

The vessel then proceeds through the water at the exact rate of a mile in ten minutes. Here again no fractions—how fortunate!

Just as she has passed over two miles of water the sound comes aboard at exactly right angles to the course of the ship. The time is exactly 2:50, and the compass bearing exactly north 30 degrees east—note, not 23 degrees or 29 degrees, or any other bothersome odd number, but just 30 degrees—an even third between north and east.

He changes his course at 2:50, but even that does not affect the series of coincidences. At exactly 3:00 o'clock he takes his compass bearing. Are we surprised to find that at *exactly three* the sound is *exactly north*

(Dep., page 51). We are not surprised. At *exactly* 3:05 her speed is slowed. At exactly 3:10 her engines are stopped. Always it will be noted the significantly chosen numbers.

But this is not all—not by any means. At exactly two-thirty o'clock, the ship is on a point in the water *exactly* two and a half miles from the Point Reyes siren. Was there ever such perfection of calculation? From Japan to Point Reyes, and just two and a half miles off at exactly two-thirty o'clock.

At exactly 2:50 she is 1⅝ miles and at exactly 3:00 she is 1⅞ miles. No perplexities as to feet here. It would be wrong to continue at six knots in the fog unless we knew exactly where we were. We continued in the fog, ergo, we *must* have known exactly where we were.

If anyone should suggest that we are exaggerating as to Captain Lie's contention, we refer to the diagram on page 29 of his opening brief. Also to the claim that he is a "*shrewd, alert,* well trained navigator". Also to his testimony that at *three o'clock* he heard the "Beaver's" whistle dead ahead on a south 65 east course, that is *coming in from the open Pacific* and for *ten minutes* thought it was from a lighthouse on the mainland, over twenty-five miles away and in another direction.

It is a harsh and unkind act to suggest that all this fortunate nicety of coincidence, not only does not agree with what Captain Lie told to Supervising Inspector

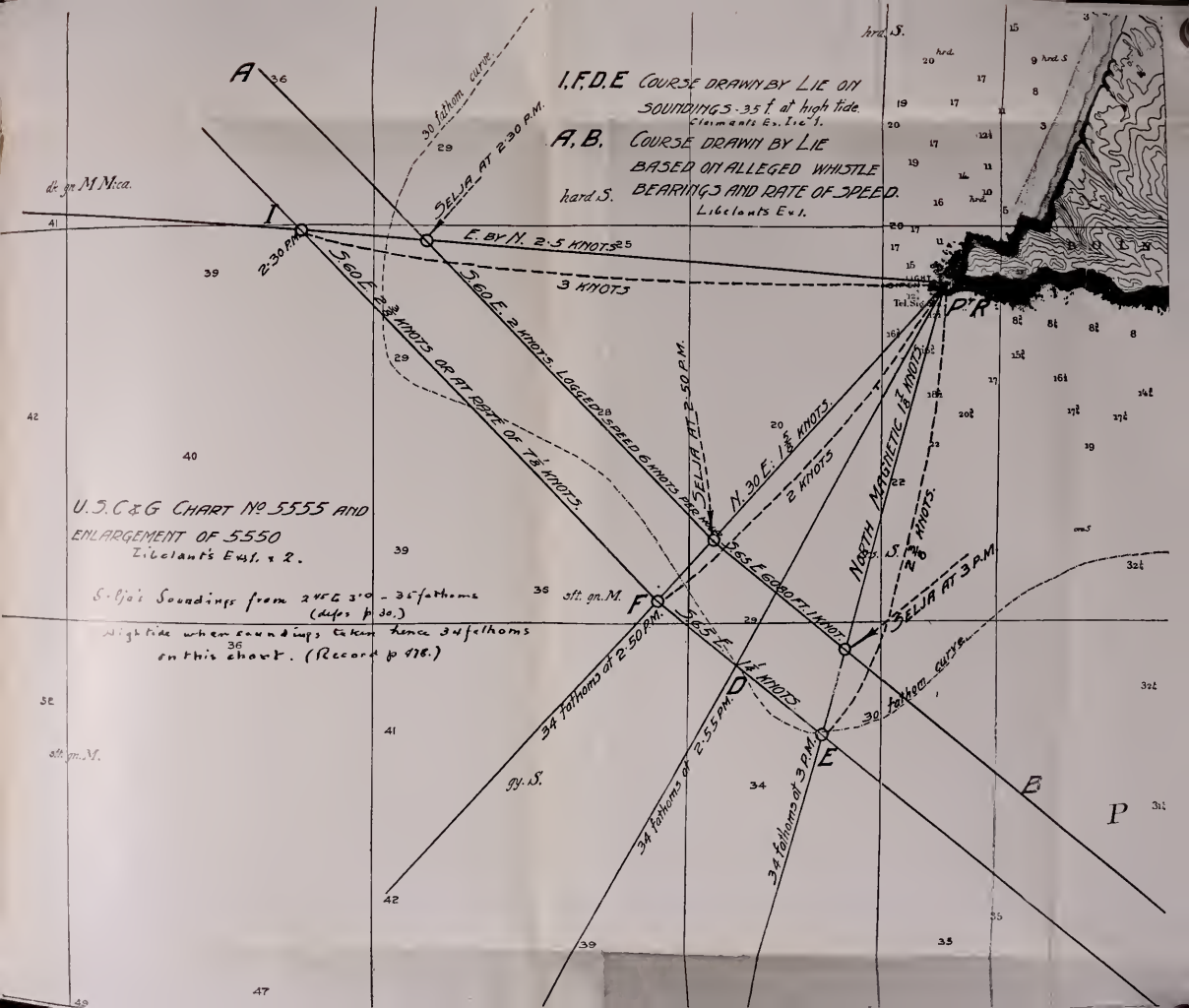
Bulger and others, but that it is contradicted in every respect by the soundings taken on board his own vessel.

Now, these soundings were taken at even five minute intervals, but there was nothing fortuitous about this. The captain ordered it so. The Norwegian officer who testified to them was not questioned by his own counsel as to their accuracy. His testimony was given in the presence of Captain Lie, who was "conducting the case" (apostles, 243) "four or five feet from the witness" (apostles, page 245). "Shrewd, alert, well trained navigator" that he was, Lie would have had him recalled in the afternoon if there had been any error in the morning's testimony.

This witness says that from 2:45 to the time of the collision he got always the same depth of water (Deposition Larsen, apostles, page 80). The significance of this statement becomes apparent when we examine the soundings in a radius of five miles of Point Reyes. They vary greatly. In that half hour the "Selja" would have covered even at the six knots claimed nearly three knots of water. *The identity of sounding is persuasive evidence that the vessel had been at a standstill for some time before the collision.*

Lie tells us that Larsen's soundings, on account of the tide, would correspond to 34-foot markings on the chart. At the hearing he plotted his course as indicated by the soundings (page 1178).

On the inserted drawing we have copied libelant's Exhibit 1, on the same chart used by Lie in making his exhibit. We have added to the chart the soundings


A
I.F.D.E COURSE DRAWN BY LIE ON SOUNDINGS - 35 f. at high tide. Claimants Ex. Lie 1.
A, B. COURSE DRAWN BY LIE BASED ON ALLEGED WHISTLE BEARINGS AND RATE OF SPEED. Libelants Ex. 1.
hard S.
30 fathom curve
SELJA AT 2.30 P.M.
I
2:30 P.M.
E. BY N. 2·5 KNOTS
S 60 E. 2¾ KNOTS OR AT RATE OF 7½ KNOTS
S 60 E. 2 KNOTS LOGGED SPEED 6 KNOTS PER HOUR
3 KNOTS
SELJA AT 2.50 P.M.
N. 30 E. 1⅞ KNOTS.
2 KNOTS
S 65 E 6000 FT. 1 KNOTS
NORTH MAGNETIC 1¾ KNOTS.
S. 1¾ KNOTS.
SELJA AT 3 P.M.
S 65 E. 1¾ KNOTS.
34 fathoms at 2.50 P.M.
34 fathoms at 2.55 P.M.
34 fathoms at 3 P.M.
30 fathom curve
F
D
E
B
P
PR
Tel. Sta.
U.S.C&G CHART No 5555 AND ENLARGEMENT OF 5550
Libelant's Exs. 1 & 2.
S. Ojo's Soundings from 24 ft 3 to 36 fathoms (depths p 30.)
Light tide when soundings taken hence 34 fathoms on this chart. (Record p 416.)
sft. gn. M.
gy. S.
dk gn M Mica.

for the portion of the claimed route of the "Selja" which Lie has drawn on the paper pasted to libelant's Exhibit 1. These added soundings, including the 30-fathom curve line, are taken from libelant's Exhibit 2, a smaller chart. The enlargement is to a scale.

We have also copied the course as finally charted by Lie under cross-examination as based on his soundings, the only fixed and certain data he had. This charting appears on claimant's Exhibit Lie 1. The enlargement here is to scale.

In explanation and comment on our drawing we offer the following:

In charting the three soundings of 34 fathoms, Lie shows his usual anxiety to make out his case, for he places his 34 fathoms right up against the 30 fathom curve line, just as if the bottom of the sea made a sheer drop at that point. However, he drew a line through the three 34 fathom soundings marked F. D. E. on *claimant's* Exhibit Lie 1, which he claims is a "fair" plotting (p. 1182) of the course as shown by them. The course thus shown is inconsistent with that shown by *libelant's* Exhibit 1 in the following respects:

1. It shows that the course prior to 2:50, i.e., S. 60 east, could at most have had but two of the five minute soundings inside the 30 fathom curve line, namely, at 2:35 and 2:40, while the course as claimed on libelant's Exhibit 1, when laid out on the chart with the soundings from 2:30 to 3:05, inclusive, shows eight soundings inside the 30 fathom curve line and hence that none could have been 34 fathoms.

2. It shows that the distance run between "F" and "E", i.e., the ten minutes from 2:50 to 3 o'clock, is 1¼ knots, or at a rate of 7½ knots an hour (page 1184), instead of the 6080 feet and 6 knot rate shown by libelant's Exhibit 1.

3. It shows the distance run between "I" and "F" 2:30 to 2:50, to be 2⅜ knots or at the rate of 7⅛ knots an hour (page 1197), while libelant's Exhibit 1 makes it 2 knots at a 6-knot rate.

4. It shows the distance from Point Reyes at 2:30 as 3 knots, while libelant's exhibit shows it as 2½ knots.

5. At 2:50 the distance from Point Reyes is 2 knots, instead of 1⅝ knots?

6. At 3 o'clock the distance is 2⅓ knots instead of 1⅞ knots (page 1206).

Lie was finally forced to admit that *libelant's Exhibit 1* was based on a mere *two* siren bearings in the fog and the distance covered between them, as shown by the log record in that heavy following swell running across his course (page 1212). He allowed nothing for the following swell or for the "coming home" and "underrunning" of the log, or the yawing of the vessel as she crossed the seas at an angle, elements which Commodore Lopez, Captain Westdahl and the other witnesses tell us vitally affect the distance actually covered as distinguished from that shown by the log.

Lie admits that in preparing libelant's Exhibit No. 1 he did not check it up with the soundings at all. That is to say he ignored the only absolutely fixed data at his command and relied on the double uncertainty of the meager two-whistle bearings and the return of the log.

He admits that *when he changed his course* at 2:50 he had neither the soundings nor the distances run. That is to say, nothing but the two-whistle bearings on a siren entirely different from what he was looking for.

He apparently ignored his soundings on all occasions save at 2:55 on his ship when he alleges he determined his position on his chart, after he changed his course. Speaking of this he told the inspectors that he knew *"just exactly where he was"*, "because he worked in on those soundings until he got from one to the other and checked off on his chart" (page 1182).

We again put the question: If his soundings at 2:55 on his ship showed "exactly where he was" why, after he came on shore, did he not plot a chart based on those soundings and not offer one to the court on which none of the claimed soundings are shown? We submit that the answer is obvious. He did not know where he was within twenty miles. He even thought he might be off the Golden Gate. As a matter of fact he was six miles southeasterly from Point Reyes, just where the "Beaver's" officers say he was, stopped in the water waiting for the fog to rise so he could determine his bearings.

Whether he had been stopped for ten minutes, as he told Mr. Bulger, Captain Lie, Mr. Frey, and the ship's officers, or for a longer or shorter period, is immaterial. He should have blown two long blasts of his whistle as provided by rule 16 and his failure to do so led Captain Kidston to believe that the "Selja" still had way on, and to adopt a manoeuver which sent him directly into the "Selja" instead of starboarding his helm and clearing her bows as he would have done if he had known she had stopped.

XII.

The point of collision could not have been where Lie locates it, two and a half knots southeasterly from Point Reyes. His whole diagrammatic scheme falls with his mislocation of this point.

In comparing the testimony of Captain Lie with the "Beaver's" witness, it must always be carried in mind that the "Beaver" was sailing on known courses and over familiar waters. Her courses were those regularly followed, from the red buoy south 83 west till off Duxbury Point, thence north 86 west, on which she continued till the vessels were *in extremis*.

The testimony is unanimous that the "Beaver's" speed under favorable conditions—that is, without wind, and with a smooth sea, or a beam swell, which would not expose her propeller—was fifteen knots at seventy-seven revolutions. It is also undisputed that the "Beaver" ran at seventy-seven revolutions from the Golden Gate to the time of the collision. The change to seventy-six revolutions at 3:10 is negligible.

The swell in the north channel, i. e., from North Heads to the red buoy, a distance of two miles, was a beam swell (795, 667). As it came on the "Beaver's" side, her whole length was lifted and fell with it and hence her propeller was not exposed or her progress impeded (795). She covered these two knots in eight minutes, or at her fifteen-knot gait. The fog was then light.

This swell across the north channel is caused by the westerly waves striking the four fathom bank which

diverts them straight across to the mainland. It was undoubtedly this beam swell which rolled the Arizonan so that the pilot on the bridge was wet, and she sustained the damage testified to (1285, 1287). The vessel was probably a little too near the breaking four fathom bank. It is not contended that when that vessel was upright a thirty-five foot wave reached her bridge. What happened was, that when she had rolled over toward the swell, a breaking sea from the bank came aboard over her side. Her speed ahead, however, would not be affected in any appreciable degree by mere rolling.

The "Beaver" left red buoy No. 2 at 1:45 (533), and the collision occurred at 3:16, an hour and thirty-one minutes later.

Here comes another of Captain Lie's extraordinary coincidences. He locates the point of collision at exactly twenty-two and a half miles from the red buoy on the courses which the "Beaver" sailed, a distance which she would just cover in an hour and a half at a fifteen-knot gait, in *smooth water*. Captain Kidston's statement which he gave before the inspectors the week before Lie made up his chart, makes the time as an hour and thirty-one minutes. It also appeared before the inspectors that the "Beaver's" engines were turning seventy-seven revolutions.

We now see why Lie found the two Danish fishermen who testified that the sea was smooth on that day—so smooth that there was not a break on the four fathom bank where a five foot wave would cause breaking water (Dickie, p. 1116). He had by that time discovered (the trial had then continued several weeks) that his various

calculations did not fit *if the swell was admittedly a heavy one.*

As we have suggested, we showed that the fishermen, if honest, must have recalled the wrong day. The maregram, the testimony of Captain Westdahl of the U. S. Hydrographic office, Mr. McAdie, Weather Chief, the four pilots, the Merchants Exchange observer, are all agreed that it was a very heavy swell, comparable with the worst storms in midwinter. *The swell could not have been less than fifteen feet to answer these descriptions.*

It takes a five foot swell at least to shut out of view the ordinary small launch on San Francisco Bay, and this is a frequent sight even on those confined waters.

There is no contradiction to the testimony that the "Beaver's" speed was cut down to the neighborhood of twelve knots on that day. This is borne out in a curious way by the testimony of our opponents' expert Dickie. Dickie tells us (at page 1116) that a five to six foot wave would cut down the speed of the vessel seven-eights of a knot an hour. Dickie, with the two other construction experts, had been giving testimony on the effect of the swell on the "Beaver's speed. Their data as to conditions on that day, they apparently received from Lie (record, pages 213, 214), and from Mr. McClanahan (page 367).

Now, taking the theory of *our opponents' witness on his own data,* the speed of the "Beaver" was retarded at the rate of seven-eighths of a knot for over an hour and a half and she must have lost at least a knot and a

quarter after leaving the red buoy. That is to say, she could have run only twenty-one and a quarter knots. *On their own figures* we thus see the point of collision could not have been where the "alert and shrewd" Lie places it, but a knot and a quarter further towards the mysterious land foghorn he heard coming from out the Pacific.

The log records the "Beaver's" run from the red buoy to the place of collision as 19.6 knots. As the sea was a head sea the the vessel's actual run could not have been more than that. As a matter of fact the intense violence of the swell may well have made the log overrun over a knot in that time, bringing her actual run from the red buoy down to less than eighteen and a half knots and *four* knots from Lie's location of the place of collision. This would make it just about the six miles approximate distance from Point Reyes Lighthouse and four miles from the south end of the point at which Captain Kidston's compass bearings *after the fog had lifted* would place her.

Our opponent endeavors to cast some doubt on the accuracy of the distance as shown by the log, because the captain, who heard the whistle for setting the log at zero at the red buoy, admitted he did not *see* it set. The witness Ettershank stated unequivocally that it *was* set at zero at 1:45 (page 514), and his testimony was not questioned on cross-examination.

Our opponent also, with reckless disregard of his experts' testimony, tells us that our speed was in *any*

event fifteen knots through the water, even if it was not over the ground—as if there were some distinction where there is no appreciable current. When the swell, by exposing our wheel, wasted our energy on the air instead of expending it in the water, our speed was absolutely cut down for every purpose, whether covering water or crossing land.

Let us then summarize the evidence in this case inconsistent with the shrewd Lie's diagrammatical placing of the point of collision.

1. His diagram is flatly contradicted by the "Selja's" soundings.

2. It makes no allowance for the difference between distance *logged* and distance *run* by the "Selja", due to her "yawing" on a course diagonal to the swells (Lopez, page 747).

3. It allows nothing for the underrunning of the "Selja's" log in a following sea (Lopez, page 747).

4. Its location presupposes a miraculous combination of fortuitous events in the movements of the "Selja" in the three-quarters of an hour preceding the collision.

5. It is a knot and a quarter distant from the point which the "Beaver" would have reached, under the estimated retardation of libelants' own witnesses, Dickie et al.

6. It is three miles from the point as shown by the "Beaver's" log without deductions for overrunning in a head swell.

7. It is over four miles from the point determined by Kidston's actual compass bearings after the fog had lifted—and as estimated by the "Beaver's" officers and lookout.

8. It presupposes that the "Beaver", sailing at her usual seventy-seven revolutions, was proceeding in a *smooth sea,* whereas the "Selja's" own officers, the maregrams, Captain Westdahl, Mr. McAdie, the four pilots, the Merchants Exchange observer, and the "Beaver's" officers, all agree that it was a very heavy swell and the unprejudiced witnesses, i. e., the United States officers and the pilots, agree that it was a swell equal to the worst storms of midwinter.

9. And finally, because the speed of the "Selja", i. e., six knots under forty revolutions, is presumed to have been *entirely unaffected* by this tremendously heavy swell which our opponents' experts tell us exercises a far greater effect on the slow merchantman than on the faster vessels of finer lines.*

> "Mr. Dickie. If the swell was not large it would not affect the speed.
>
> Q. Suppose the swell were very large?
>
> A. Then it would affect the speed.
>
> Q. And affect the speed considerably, would it not?
>
> A. In a very fast ship not so much, *in a slow ship a great deal"* (page 1049).

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* In this connection it is well to note that Lie as usual contradicted himself. When before the U. S. Inspectors he swore that the following sea gave Lie headway after the engines were stopped. His testimony then was, "The sea was astern and she had headway" (p. 1210.) He said to the mate "She is going a little ahead because there was a heavy swell from astern" (pp. 1211, 1212.) When it became necessary to sustain the diagram his testimony changed to the following: "Q. Don't you think it is just possible captain that the following sea helped you some? A. Absolutely not" (p. 1189.)

It is submitted that everything (save his absurd diagram) indicates that Captain Lie is in error when he places the point of collision at two and a half miles from Point Reyes lighthouse, and that the preponderance of the evidence supports Captain Kidston's testimony that it was somewhere around six miles southeasterly from the lighthouse.

XIII.

Consideration of the testimony of the construction experts. The testimony of these gentlemen is of no value for sea conditions.

For instance, at pages 384, 385, the expert Heynemann is asked the distance traveled by the "Beaver" after she left the heads. The question presupposes that she had the same sea conditions the whole way, whereas her first two miles in the north channel were with a beam sea which did not impede her at all, while all the rest of the way she was checked by a head sea which kept her propeller out of water. The fifteen knot rate she made in the beam sea is no criterion of her speed the rest of the way.

The next question (on page 387) has the same error. Its answer is irrelevant to the case. So also the next (page 388) presupposes the "same conditions" for the whole way.

The next question (on page 388) presupposes that the "Beaver" has run 23.25 knots over the same conditions. The evidence shows the conditions were not the same at sea as in the channel and that as a matter of fact she did not run 23.25 knots or over 18.5 knots.

The question on page 389 presupposes the "Beaver" was making eighty-four revolutions. She did not, as a matter of fact, make over seventy-seven. The same error exists in the next question.

The next question presupposes that the speed of the "Beaver" at seventy-seven revolutions is 13.572 knots,

and so also does the next. The fact is that her speed at seventy-seven revolutions is 15 knots in smooth water.

The next several questions are immaterial. We do not claim that Kidston set his speed at seventy-six revolutions to reduce his speed, but to make certain his rate. We admit we had some headway on when we struck the "Selja"—how much is immaterial.

The fourth question, on page 390, concerns the movement of the "Beaver" under a reversing propeller, while she was still making headway. Mr. Heynemann declines to answer, as he says it involves a knowledge of navigation, but the other experts, the two Messrs. Dickie, said the "Beaver" would not swing to her starboard.

Later, however, it was shown that the question did not truly state the conditions, and (after we offered to turn the "Beaver" over to them, page 1305) it was admitted she would be turning to starboard under the conditions as they actually were (1363).

The questions on page 391 are based on the theory that the "Beaver" had her speed cut down to 11 knots. As a matter of fact she did not go below twelve at any time.

We do not question the slight difference between the speed and distance covered at seventy-seven revolutions and seventy-six revolutions, as shown by the questions and answers on page 392.

We are agreed with the statements at the bottom of page 392 and top of page 393. The "Beaver" would not make over 16.55 knots with 4448 indicated horse

power. And we agree with our opponent in placing her speed at seventy-seven revolutions at 15 knots in a calm sea.

Now as to the "Selja". There is no relevance to the testimony (page 394), that the "Selja" going at six knots would have stopped in a certain number of seconds if she was reversed full speed, or that she would travel a certain number of feet. She did not reverse until she had been at a standstill for some minutes. The same is true for the testimony on page 395, as to what she would have done if reversed while running three knots.

The next answers are very interesting (page 396). They are that at forty revolutions the "Selja" would have a slip of but 6.46 per cent when making six knots. *This is just about the normal slip for such a vessel in smooth water.*

We are then confronted by this astonishing condition of affairs. A smooth sea at *Point Reyes* and the maregram and the five disinterested witnesses showing undisputably a swell at the *Golden Gate* equal to the heaviest storm in midwinter, and which the maregram also shows has been there for hours before. Now this was a westerly swell, it must have passed Point Reyes to reach the Golden Gate, and yet it did not have the slightest effect on the "Selja's" speed!

We know that it cut the "Beaver's" speed down about twenty per cent, i. e., 3 knots from a 15-knot gait. The experts (our opponents) tell us that it would cut down a slow vessel a much greater percentage (1049). The sea must have had some miraculous calm

at that point, to be in harmony with the extraordinary coincidences from which Captain Lie made up his diagram as to his location in the fog.

Mr. Heynemann next tells us (413) that the reason the scratches on the "Beaver's" bow would seem to indicate that she entered the "Selja" at an angle of 59 degrees when she struck her at somewhere between seventy and ninety, was because the scratches were caused by the stern motion of the "Selja" as she moved at right angles across the "Beaver's" bow (423). We are entirely agreed as to this. The "Selja" was at a standstill at right angles to us, lying in the trough of the sea. She had been reversing for a minute before we struck her and continued for over a minute afterwards. Naturally she pulled the "Beaver's" bow around and made scratches farther back on the port than on the starboard side.

The significant thing about all this, however, is that it completely destroys the "Selja's" attempted excuse that she was backing away from us. At the end of a minute she had moved but one hundred feet less than a third of her length, *across* our bow, and was exposing her whole broadside to the regular route of vessels along the coast.

We next come to the testimony as to the time it would take the "Selja" to stop. These answers are based on formulae made up from the launching pool and have no relation to the movements of a vessel in the open sea in such a swell as existed on that day.

To show how absurdly theoretical the experts' work was, Mr. Heynemann tells us that in the course of stop-

ping, the "Selja" ran but *seven feet in one minute and forty seconds* (1009).

One slap of that huge swell would send her fifty feet one way or the other, and yet we are asked to calculate her stopping on a formula which takes into consideration a motion of seven feet in a hundred seconds.

It would seem that nothing more need be said of the experts, save to regret that we were unable to offer to let them check their theories as the "Selja's" movements, in the same way as we did with the "Beaver".

In conclusion we submit:

That if the "Selja's" story is true:

Judge Bean's decision must be sustained as she is shown to have violated rule 16, the results of which violation continued till the vessels were *in extremis* and hence was liable; also that the "Selja" violated the excessive speed rule and the prudential reversing rule;

And we further submit that if the court stated the real facts, she was lying dead in the water, while blowing a *one* whistle signal, thus deceiving the "Beaver" into believing that she was moving across his bows, whereas if the truth had been known the "Beaver" could have passed ahead of the "Selja" in safety.

Respectfully submitted,

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